Supreme Court of the United States

October Term, 1946.

No. 343.

STATES OF NEW YORK, DELAWARE, ET AL.,
APPELLANTS,
versus
UNITED STATES, ET AL.

No. 344.

THE HONORABLE HORACE A. HILDRETH,
GOVERNOR OF THE STATE OF MAINE, ET AL.,
APPELLANTS,
versus
UNITED STATES, ET AL.

No. 345.

THE ATCHISON, TOPEKA & SANTA FE RY. CO., ET AL.,
APPELLANTS,
versus
UNITED STATES, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE SOUTHERN STATES AND SOUTHERN GOVERNORS' CONFERENCE, APPELLEES.

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REFERENCE TO THE OFFICIAL REPORT OF THE OPINION DELIVERED IN THE COURT BELOW.

The opinion of the court below is reported in 65 Fed. Supp., page 856, and will also be found in the record at pages 1411 to 1439. The original report of the Interstate Commerce Commission is reported in 262 I. C. C., at page 447, and will be found in the record at pages 62 to 381. The supplemental report of the Interstate Commerce Commission is reported in 264 I. C. C., page 41, and will be found in the record at pages 428 to 432.

JURISDICTION.

On October 14, 1946, this court noted probable jurisdiction in these cases. This being a proceeding to enjoin an order of the Interstate Commerce Commission jurisdiction is conferred by the Urgent Deficiencies Act of 1913, 38 Stat. 219, 28 U. S. C. A., Secs. 41, 43-48.

QUESTION PRESENTED.

The sole question here presented is as to the validity of an order of the Interstate Commerce Commission requiring, as an interim measure, an increase of 10% in class rate within Official territory (hereinafter described) and a reduction of 10% subject to a minimum scale in all other class rates in the territory east of the Rocky Mountains. This order was made upon a finding by the Commission that existing class rates were unjust, unreasonable and unduly prejudicial and

preferential in violation of Sections 1 and 3 of the Interstate Commerce Act, and that the rates prescribed would be just and reasonable pending the bringing about of uniformity in classifications and the establishment of a permanent class freight rate structure which the Commission directed the railroads to ultimately establish but as to which it entered no order. The questions as to the uniform classification and permanent rate structure are therefore not in issue here.

STATUTES INVOLVED.

The pertinent provisions of Sections 1, 3, 15 and 15(a) are reproduced in the Appendix hereto.

STATEMENT.

This brief is filed on behalf of the States of Alabama, Florida, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee, and the Southern Governors' Conference, a voluntary organization of the Governors of said States, intervening defendants in the court below and appellees herein.

These are suits to set aside an order of the Interstate Commerce Commission dated May 15, 1945, as modified by its order dated October 30, 1945, entered in Docket No. 28300, *Class Rate Investigation, 1939.* They come to this court on an appeal from an order of the United States District Court for the Northern District of New York, sitting as a specially constituted Three Judge Court under the provisions of the District Court Jurisdiction Act, 38 Stat. L. 219, denying

an injunction restraining the enforcement of the above-described order issued by the Interstate Commerce Commission and dismissing the petitions seeking such injunction.

HISTORY OF THESE PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

By order entered the 29th day of July, 1939, in Docket No. 29300, *Class Rate Investigation, 1939,* the Interstate Commerce Commission, pursuant to authority vested in it by Section 13(2) of the Interstate Commerce Act, instituted an investigation into the class rates applicable throughout the territory east of the Rocky Mountains and provided that the investigation was entered into "with a view to determining whether said rates and charges, of any of them, are unjust, unreasonable, unduly prejudicial, unduly preferential, or otherwise unlawful, and making such finding and order, or orders, as may be proper in the premises." All parties were therefore put upon notice that all of the class rates throughout the territory east of the Rocky Mountains were brought under review for determination whether any of them are in violation of any provision of the Act and that upon a finding of unlawfulness as to any of them, the Commission would make such order or orders as may be proper in the premises.

On the same date an order was entered in Docket 28310, *Consolidated Freight Classification,* instituting an investigation into the lawfulness of freight classifi-

cations throughout the United States. While the two investigations were heard on the same record the investigation in Docket 28310 is not here involved, no order having been entered therein.

It will be noted that these investigations were ordered prior to the amendments of 1940 and therefore could not have been in compliance with such amendments. However, by letter dated January 29, 1940, the Commission advised Congress that the investigation instituted in 1939 would be carried out pursuant to such amendments.

These proceedings are but one step forward in a course which the Commission has been pursuing for many years. At the inception it is necessary, however, to understand the interterritorial problem and distinguish between class rates and commodity rates. Class rates usually apply to high grade commodities, such as manufactured articles, and are published on mileage scales in all territories and interterritorially. The commodity rates which move the raw materials, such as coal and iron ore and other commodities moving in volume between specific points, are made on many different bases and it is impossible to generalize concerning them.

The class rate structures of the United States have been developed on a regional basis. There are five general rate territories, they being as follows:

1. Eastern, or Official territory, which is roughly that part of the United States north of the Ohio and Potomac Rivers and east of the Mississippi River.

2. Southern territory, which is that part of the United States south of the Ohio and Potomac Rivers and east of the Mississippi River.

3. Western Trunk Line territory, which is that part of the United States west of the Mississippi River and north of the Oklahoma-Arkansas lines, extending to the Rocky Mountains. This territory is divided into three zones.

4. Southwestern territory, which is west of the Mississippi River, south of Western Trunk Line territory, extending to the Rocky Mountains.

5. Mountain Pacific territory, which is all of the territory west of Western Trunk Line and Southwestern territories. This territory is not involved in these proceedings.

Within each of these territories there is a separate and distinct class rate structure with higher class rates in the South and West than in Official territory and higher class rates between those territories and between them and Official territory than obtains within the latter territory.

Originally the class rates within the various territories were in a more chaotic condition and varied in measure as much or more than the class rates here involved. The Commission dealt with the class rates in each of the several territories separately and prescribed uniform scales for uniform application throughout such territories. This was done as to Southern territory in the *Southern Class Rate Investigation*, 100 I. C. C. 513, 109 I. C. C. 300 (1926), and

subsequent reports. As to Official Classification territory the uniform scale for uniform application was prescribed in *Eastern Class Rate Investigation,* 164 I. C. C. 314 (1930). In that case the Commission said, at page 323:

> "The rate structures in effect within and between the three subdivisions of Official Territory have grown up independently of each other and for the most part with little common resemblance."

In referring to the situation within Trunk Line territory, which was then one of the three subdivisions of Official territory, the Commission said, page 324:

> "As a result of this vigorous market and carrier competition the class rates in Trunk-Line territory show a marked lack of uniformity, viewed from the standpoint of distance, as well as a great diversity of relations between the classes."

In the *Southern Class Rate Case,* the Commission said, at page 533:

> "All the southern lines publish distance scales of class rates which apply locally in the absence of specific rates, but there is no harmony or consistency in these scales. The levels differ widely, as do the percentage relationships of classes. This is also true of the specific rates."

Rates in Western Trunk Line territory were prescribed and many varying rates consolidated into a uniform scale. *Western Trunk-Line Class Rates,* 204 I. C. C. 595 (1934).

It will thus be seen that the only difference between this proceeding and the proceedings in the previous Class Rate Cases is that the territory embraced in this proceeding and for which uniform rates are ultimately to be established is more extended than in the other cases. The Commission has been ironing out the differences and discriminations step by step. At first the need was for a consistent class rate structure within the large territories into which the country had been divided for rate-making purposes. As traffic began to move greater distances and especially as it began to cross territorial lines in great volume it became necessary to widen the area within which class rates are made uniform, therefore this proceeding was a logical and almost inevitable outcome of the previous Class Rate Cases.

In its report herein the Commission recites the conditions that led up to the present proceedings and points out the necessity of harmonizing the rate structures of the several territories. At page 698 of the report (R. 313), the Commission says:

> "This evidence discloses extensive, widespread, and varying differences in the several territorial class-rate structures. The differences in the class rates themselves, however, are greater than the average differences in rate structures as a whole, or than the average differences in class rates, exception rates, and column rates taken together. The basic class-rate scales not only differ in level but also in their rates of progression with distance. There are also disparities and variations in the percentage relations between the scales.

"The origin of the foregoing condition as it relates to interterritorial as contrasted with intraterritorial rates may be explained by a study of our previous decisions in which the several territorial class-rate structures were prescribed. Prior to the dates of those revisions, there was a general miscellany of class rates prevailing within each territory as well as extensive differences, on the average, between the territories. Those decisions resulted in the prescription of intraterritorial class-rate structures that exhibited a marked and previously unattained degree of uniformity and consistency. They failed, however, to effectuate uniformity as between the territories. As a result of this incongruous situation, the interterritorial rates could not be properly harmonized with the intraterritorial rate structures. Interterritorial shippers using class rates are thus adversely affected, particularly when they ship into official territory where the greatest disparities between interterritorial and intraterritorial rates exist. The record indicates a distinct probability of continuing growth of interterritorial traffic as a result of changes in the economic pattern of the country. All territories are experiencing an industrial growth. This fact emphasizes the need for properly adjusted interterritorial class rates."

It will be seen that the Commission is pursuing a consistent course in an effort to harmonize the class rate structures throughout the country, so as to afford each community an equal opportunity for development. The necessity for a permanent expert body to work out such matters has always been recognized by

the Congress, and we have here a striking illustration of what the court had in mind when in *Board of Trade v. United States,* 314 U. S. 534, it said, at page 546:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. *Cf.* Railroad Commission v. Rowan & N. Oil Co., 310 U. S. 573, 581, 582, 84 L. ed. 1368, 1373, 1374, 60 S. Ct. 1021."

Pursuant to the orders of investigation entered by it on July 29, 1939, the Commission held prolonged hearings throughout the country as to the lawfulness of the classifications and the class rates in and between all of the territories involved, resulting in a voluminous record, which is now before this court. In order that all pertinent facts be developed the Commission caused studies covering cost of transportation, economic resources and developments of the several territories and classifications of traffic to be prepared by its staff and presented in evidence by the authors thereof, who were subject to cross-examination as other witnesses. Many hundreds of shippers, as well as Governors and Public Service Commissions of the several States, appeared and participated in the proceedings. Voluminous briefs were filed and the Commission heard some ten days of oral argument.

The Commission, on May 15, 1945, handed down its original report herein, wherein it found that there should be a uniform classification for application throughout the United States and set up a scale of rates for application throughout the territories here involved. No order was entered, however, prescribing a uniform classification or requiring establishment of the uniform scale of rates found to be just and reasonable, but the railroads were admonished to proceed to prepare the Uniform Classification and upon its adoption to establish the scale of rates set up by the Commission.

However, an interim order was issued that required an increase of 10% in the interstate class rates applicable to freight traffic moving at the classification ratings within Official territory, and a reduction of 10% in interstate class rates applicable to freight traffic moving at the classification ratings within Southern, Southwestern and Western Trunk Line territories and interterritorially between those territories, and also between those territories and Official territory. It is this order, as modified in unimportant particulars by the order of October 30, 1945, that is here under attack. It is important to keep in mind that none of the other matters discussed by the Commission in its report, such as classification and permanent adjustment, is in issue here.

The order here is designated as an "interim order" because it is to remain in effect only until the uniform classification can be adopted and a uniform scale applied thereto. It will be noted, however, that the order

does not go as far as the findings of the Commission because the order leaves the rates in the South and West and between the territories on a higher basis than the rates in Official territory, while the ultimate findings would require a parity. The first-class rate in the South under the order will be at least 113% of the first-class rate in Official territory and higher when affected by the prescribed minimum scale and in the West the percentage will be much higher. Interterritorial rates will also be higher in all instances than the rates within Official territory.

Within the prescribed time after the original report and order were issued, the appellants here, and others, filed lengthy petitions for reconsideration and modification, to which these appellees, and others, replied. Upon due consideration of these petitions and responses, the Commission issued its supplemental report of October 30, 1945, in which it considered the questions raised but reaffirmed its original report and order except for certain modifications that are unimportant here. Thereupon the carriers, including the appellants in No. 345, filed tariffs effective January 1, 1946, establishing rates pursuant to the order, but these tariffs were suspended by the Commission pursuant to the interlocutory injunction granted by the District Court and are still under suspension awaiting the decision of this court.

THE PROCEEDING IN THE DISTRICT COURT.

On November 27, 1945, the States of New York, Delaware, Indiana, Maryland, Michigan, New Jersey, Ohio and Wisconsin, and the Commonwealth of Pennsylvania, filed their petition in the District Court of the United States for the Northern District of New York, seeking an order enjoining, setting aside and annulling the said reports and order of the Commission. A statutory Three Judge Court was organized, consisting of the Honorable Harrie B. Chase, Circuit Judge, and the Honorable John C. Knox and Steven W. Brennan, District Judges. The District Court granted petitions to intervene on behalf of the Western Railroads, the Governors of the New England States, the Interstate Commerce Commission, the Southern States and the Southern Governors Conference, certain Western and Southwestern States and several State Commissions. Later a separate petition was filed by the Western Railroads. The Governors of the New England States did not file a separate petition, but are intervening plaintiffs in both suits.

On December 20, 1945, the District Court granted an injunction *pendente lite* restraining the enforcement of the Commission's order.

The District Court, all three Judges sitting, held a hearing on February 18-21, inclusive, during which the court received certain additional testimony and exhibits relating to the issue of confiscation, which it was alleged would be caused to the western railroads if the proposed rates were placed in effect. The court re-

ceived briefs and heard extended arguments and proceeded to consider the case at length. On May 9, 1946, the court filed a comprehensive unanimous opinion concluding that the injunction should be denied and the petitions dismissed.

On May 23, 1946, the Court heard arguments on motion to continue the injunction pending appeal and on May 27, 1946, it filed its final decree and order dismissing the petitions in accordance with the opinion, but continuing the stay of the Commission's order pending determination of this appeal. The case is here on appeal from this final decree and order.

THE ONLY RAILROADS ATTACKING THE ORDER ARE THOSE IN THE WESTERN DISTRICT.

Neither the southern railroads nor the railroads in Official territory have made any attack on the Commission's order or in any way participated in the court proceedings. On the contrary, all of these carriers promptly published the rates in compliance with the order and have in every way evinced their willingness to put such rates in effect. This fact has an important bearing here since some of the questions raised, particularly in attacking the increase in the rates in Official territory, could, as we contend, be properly raised only by these railroads.

SUMMARY OF ARGUMENT.

1. The sole question here presented is as to the validity of the order of the Commission requiring an increase of 10% in class rates within Official territory and a reduction of 10% in other class rates in the territory east of the Rocky Mountains. While the Commission directed the railroads to prepare a uniform classification and apply a uniform class rate scale thereto, it entered no order with respect to such matters and therefore the validity of these findings is not before the court.

2. This court will not set aside an order of an administrative agency or commission which has been upheld by the reviewing court below unless "the record establishes that clear and unmistakable error has been committed."

3. The District Court did not err in holding "that the Commission correctly decided that the *ad interim* order under review was within the scope of its statutory authority"; and that there were full hearings and no irregularities in the proceedings.

4. The District Court correctly held that the Commission made all necessary primary and ultimate findings and that such findings are supported by substantial evidence.

5. The Commission properly construed the 1940 Amendment to Section 3 of the Interstate Commerce Act and Section 5(b) of the Transportation Act of

1940, commonly known as the "Ramspeck Resolution" as the District Court correctly held.

6. The District Court correctly held that the order is not erroneous because the carriers were not allowed an alternative method for the removal of discrimination since this is a rate order made under Section 15.

7. The District Court properly declined to hold that the order was invalid because of the alleged failure of the Commission to find that respondent railroads have a common control over the rates involved.

8. The District Court correctly held that it was not necessary in order to prescribe increased rates under Section 1 that the Commission find existing rates were not compensatory or would result in rate wars.

9. The District Court properly held that the order was not rendered invalid by refusal of the Commission to reopen the proceedings for further hearing.

10. Other collateral questions raised by appellants were correctly held by the District Court not to affect the validity of the Commission's order.

11. The order here under review has not been "vitiated" or "rendered obsolete" by the action of the Commission in *Ex Parte* 162.

ARGUMENT.

THE ONLY QUESTION BEFORE THE COURT IS THE VALIDITY OF THE INTERIM ORDER INCREASING CLASS RATES WITHIN OFFICIAL TERRITORY BY 10 PERCENT AND REDUCING BY 10 PER CENT OTHER CLASS RATES EAST OF THE ROCKY MOUNTAINS.

It is important to keep in mind that the only issue before the Court is as above stated because when this is done much of the argument of appellants loses its force, particularly the argument that the Commission misconstrued the Amendments of 1940 to require the establishment of uniform rates. The order in question does not establish uniform rates, nor does it go as far as the findings of the Commission would justify because the order leaves the rates in the South and West and between the territories on a higher basis than the rates in Official territory while the ultimate findings would require a substantial parity. The first class rate in the South under the order will be at least 113% of the first class rate in Official territory and higher when affected by the prescribed minimum scale and in the West the percentage will be much higher. Interterritorial rates under the order will also be higher in all instances than the rates within Official territory. Moreover, the order does not in any way involve the matter of classification since the rates ordered increased or reduced are subject to existing classifications which differ in the several territories.

As to the future preparation of the uniform classification and the application thereto of a uniform class rate scale, the action of the Commission is directory and therefore not subject to judicial review. The distinction between such action and the exercise of the Commission's mandatory power by an order requiring the carriers, subject to its jurisdiction, to do a particular thing or establish particular rates is clearly pointed out in *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, 528, where the court stated:

> "Even in the regulation of rates, as to which the Commission possesses mandatory power, it frequently seeks to secure the desired action without issuing a command. In such cases it customarily points out in its report what the carriers are expected to do. Such action is directory as distinguished from mandatory. *No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review.*" (Italics ours.)

Here appellants, having attacked the "report and order," apparently seek to bring into issue before the Court various findings of the Commission as to classifications and rates which it directed, but did not order, the carriers to put into effect at some future date. By so doing, they seek to confuse the clear-cut issue here of the validity of the order, which was confined to requiring a 10% increase in the class rates in Official territory and a 10% reduction in other class rates.

THE SCOPE OF REVIEW BY THIS COURT IS NARROW AND LIMITED TO THE DETERMINATION OF WHETHER THE RECORD ESTABLISHES THAT CLEAR AND UNMISTAKABLE ERROR HAS BEEN COMMITTED.

In a long line of decisions this court has defined the narrow limits of review by it of orders of the Commission, especially when such orders have been upheld by the reviewing court below. It seems necessary to quote from only a few of the court's decisions to this effect.

In *Virginian R. Co.* v. *U. S.*, 272 U. S. 658, the court said, at page 663:

> "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province."

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, the court pointed out that it had theretofore "ascribed" to the findings of the Commission "the strength due to the judgment of a tribunal appointed by law and informed by experience," and also that in recognition of the Commission's expertise the court was led not to bind the Commission to common law evidential and procedural fetters and then proceeded to summarize the limitations on court review as evolved from its previous rulings, as follows (p. 139):

> "From these general considerations the court evolved two specific doctrines limiting judicial

review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the *doctrine of administrative finality.* Even when resort to courts can be had to review a commission's order, *the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied the Commission's order becomes incontestable.* Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 S. Ct. 155; Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 56 L. ed. 308, 32 S. Ct. 108." (Italics ours.)

In *Cincinnati, H. & D. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 142, the court said, at page 154:

> "The statute gives *prima facie* effect to the findings of the Commission, and, when those findings are concurred in by the circuit court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed."

The foregoing rule that the findings of fact made by an administrative board and concurred in by a

reviewing court below will not be disturbed unless clear and unmistakable error has been committed is so well established we do not deem it necessary to quote additional authority. We might cite, however, the cases of *National Licorice Corp.* v. *National Lab. Rel. Board,* 309 U. S. 350; *International Assn. etc.* v. *National Lab. Rel. Bd.,* 311 U. S. 72.

THE COMMISSION MADE THE NECESSARY FINDINGS.

The charge is repeatedly made by appellants that the order of the Commission is invalid because of the failure to make necessary preliminary findings. It is somewhat difficult to determine all of the preliminary findings that all of the appellants insist should be made, but apparently they all insist that any findings that *might* have been made in support of the Commission's ultimate findings *must* be made or the ultimate finding is unsupported. In the opinion of the District Court there is set forth a rather complete enumeration of the findings which appellants contend were not made but are essential to the validity of the ultimate findings, as follows (p. 869; R. 1429, 1430):

> "These so-called preliminary findings which are lacking and of which proof is also lacking are said to be that there is no finding of a threatened rate war which would jeopardize the revenues of the railroads in Official Territory; or that the existing class rates are not fully compensatory to railroads in Official Territory for the transportation services for which they are charged; or that

they are so low as to cast an undue burden upon other traffic. Also it is argued that the finding of undue prejudice and preference created as between territories by the present class rates is arbitrary because not based upon preliminary findings made on proof by means of substantial evidence to the effect that the class rates published are the rates at which the freight moves; because findings and proof of a competitive relationship between the party preferred and the party prejudiced are lacking; because findings and proof of substantial injury to the party found to be prejudiced and of substantial benefit to the party found to be preferred are lacking; because findings and proof that the same carrier or carriers are responsible for or control both the preferential and prejudicial rates are lacking; because findings and proof that the carriers charge existing class rates on the same kinds of freight moved into Official Territory which is carried at class rates within Official Territory are lacking; because findings and proof that similar freight is carried under similar conditions in each territory are lacking; and perhaps there are other grounds of similar nature. The suit brought by the Western Lines and supported by the interveners aligned with them adds the ground that the *ad interim* reduction in the class rates in the West is confiscatory."

Later in its opinion, in discussing the question "whether the order is based upon adequate findings," the court said (p. 873; R. 1435):

"Such primary findings need not be listed again. We now refer to them as set forth in the

above statement. They relate in one way or another to what have been held essential to be proved to establish a basis for findings of preference, or prejudice or discrimination as to rates before the amendment of 1940 to section 3 (1) of the Act. They are matters which are still pertinent and if evidence to support findings to supply the lack pointed out as to this record had, or could have been, offered it would undoubtedly have been admissible and findings in accord with it would have given added support to the order made. But it is quite another thing to say that all such findings are needed to support the so-called ultimate findings made and the *ad interim* order based on them. For instance, it has been argued that there can be no increase in class rates in Official Territory unless there is first a so-called primary finding, supported by substantial evidence that the present rates are not compensatory. While that fact, if proved, would have been of much significance the failure to prove it and the consequent lack of a finding that present rates are confiscatory does not leave the Commission's finding that the rates are unlawful unsupported by substantial evidence. It weighed all the evidence and found that it tipped the scales in favor of its ultimate finding that the present rates were unlawful. That basic conclusion if supported sufficiently by other evidence, was enough to justify the exercise of the Commission's statutory power to alter the rates as needed to make them lawful for the future. Pennsylvania R. Co. v. United States, 323 U.S. 588, 65 S. Ct. 543, 89 L. ed. 478; Chicago, B. & Q. R. v. United States, D. C., 60 F. Supp. 580; Scandrett v. United States, D. C., 32 F. Supp. 995, affirmed 312

U.S. 661, 61 S. Ct. 736, 85 L. ed. 1108; Jefferson Island Salt Mining Co. v. United States, D. C., 6 F. 2d, 315. We think enough was proved and found to warrant such basic conclusion."

In our later discussion we will show that many of the findings enumerated by the court, which appellants claim are necesary to support the ultimate finding, were, as a matter of fact, made and that those which were not made were not necessary to support the ultimate findings and order.

The Commission found all of the rates unlawful, in violation of Section 1, because unjust and unreasonable and that the rates within and into Official territory were unlawful in violation of Section 3 because unduly discriminat[illegible]. This latter finding is the one of most importance to the appellees on whose behalf this brief is filed because it is pursuant to this finding that the rates from the South into Offic.al territory are ordered to be reduced and the rates within Official territory increased. The rates within the South were ordered reduced under a finding that the existing rates are unreasonable, in violation of Section 1, and so far as has appeared no one is attacking that portion of the order. Certainly the Southern railroads are not attacking it and no one but the southern railroads appear to have any right to attack it.

We will, therefore, proceed to first discuss the question of sufficient findings to support the ultimate finding of a violation of Section 3, and also the authority of the Commission to enter the order based on such ultimate finding.

THE EVIDENCE AS TO COST OF SERVICE SUPPORTS THE COMMISSION'S FINDINGS.

Inasmuch as the evidence as to cost of service supports both the finding as to violation of Section 3 and the finding as to violation of Section 1, we will first briefly outline this evidence and the conclusions which the Commission draws therefrom.

At the prehearing conference in Chicago, October 28-29, 1940, it was suggested that the Commission's staff compile certain basic data. A cost study of the Class 1 steam railways was prepared by the Cost Section of the Commission's Bureau of Transport Economics and Statistics and presented by Dr. F. K. Edwards, head cost analyst of the Commission, and made available to the parties and the public prior to and during the course of the hearing and it was received in evidence. The study has been reproduced in substantial part as Senate Document No. 63, 78 Cong., 1st Sess. It is a relative cost study, showing the extent to which territorial differences in transportation cost exist in both the out-of-pocket and the fully distributed costs and reflects the differences in composition of traffic and distinguishes between the class of traffic carried on the basis of the class of equipment in which it was handled. The study is based upon the 1939 annual reports of the carriers, but adjusted to reflect relative territorial costs for the periods 1930-1939, 1937, 1941 and 1941, and to reflect the revised assignment of commodities to classes of equipment. The study shows cost separately for the different

classes of equipment—tank cars, box cars, gondola and hopper cars—and others. It recognizes the importance of differences in composition of traffic and distinguishes between the kinds of traffic carried on the basis of the classes of equipment in which it ordinarily moves. A more detailed discussion of the methods and formulas used in the Edwards cost study, as well as other studies offered in evidence will be found in the brief for the Government and the Interstate Commerce Commission and need not be repeated here.

Statements of the cost of transporting freight in various types of equipment in the different territories as developed by the cost study, are shown in the report. A comparison of 1939 carload cost for traffic moving in box and gondola and hopper cars for hauls of 100, 300 and 500 miles is shown on pages 576-77 of the report (R. 191, 192). Based on assumed identical loads and hauls of 300 miles in box cars the fully distributed costs in the South are 6 per cent below those for Official, excluding the Pocahontas territory, and approximately the same including the Pocahontas. The cost in the West exceeds those of the East, excluding Pocahontas, 6 per cent and 12 per cent including the Pocahontas. A similar comparison based on all carload traffic handled in all classes of equipment on page 579 of the report shows that the costs in the South are 4 per cent below those for the East excluding the Pocahontas territory, and 3 per cent above the Official, including the Pocahontas territory. On the same basis the cost in the West exceeds those of the East, excluding Pocahontas 6 per cent, and 13 per cent including

Pocahontas. The cost of hauling the box car and gondola car traffic of one territory in another territory is shown on page 580 of the report (R. 190). A comparison based on the assumption that the consist of the traffic handled in the United States and in each of the territories were hauled in the East, South and West at the unit costs in each of those territories, shows that the costs in the South are approximately equal to or slightly lower than the cost for the East, excluding Pocahontas. The costs in the West are from 6 to 10 per cent higher than those in the East, depending upon the consist of traffic used in making the comparisons (581, R. 196). Cost comparisons are also made excluding Pocahontas and Kentucky. The southern carriers introduced territorial comparisons based on average net ton-mile cost adjusted for differences in the length of haul and consist of the traffic for the period 1930-39. A restatement after removal of deficiencies shows the southern unit costs to be approximately 1 or 2 per cent below those for the East, excluding the Pocahontas territory, and 6 to 8 per cent higher than the East, including the Pocahontas territory (582, R. 197). The same type of data introduced by the eastern carriers for the period 1937-41 shows that the costs for the South were approximately 8 per cent below those for the East, excluding Pocahontas, and approximately the same as those for the East, including the Pocahontas region.

The costs of less-carload traffic in the various rate territories on the basis of an assumed load of 5 tons in box cars, in each territory and also on the basis

of the actual average loads is shown on page 583 of the report (R. 200). The computation shows that the less carload costs in the South are lower than those in the East and higher in the West than those in the East.

Nearly all of the computations show that the costs in the South are below the U. S. average and below the cost in Official territory. Western territory costs exceed the U. S. average to some extent. The Commission said (591; R. 206):

> "The various comparisons of territorial costs reviewed hereinabove show that there is little significant difference in the cost of furnishing transportation in the South as compared to the East, excluding the Pocahontas territory. * * *"

The studies were criticized by many shippers and carriers. Many of the criticisms relate to details and failure to show absolute cost, and all of them were answered in detail by Dr. Edwards in his Exhibit 195 (R. 11257).

The studies were reworked to show all combinations of regions and areas requested by the parties to the proceeding. For the purpose of reconciliation, costs were developed by individual commodity classes and summarized, and the cost distributed pro rata on a ton and ton-mile basis. It is very difficult to develop cost for individual commodities, but a relative study reflects a satisfactorily relative comparison. The Commission stated (692, R. 307):

> "Since the inception of Federal regulation of common carriers cost of service has been recog-

nized as one of the basic elements entering into the process of making and judging rates. * * * The problem, from the standpoint of rate-making and rate-regulation, is to convert such costs into practicable and usable terms. * * * All cost calculations and computations, therefore, of necessity must be made by special studies. In making these studies the data afforded by the carriers' records, which are kept in accordance with our prescribed system of accounting, have been used as a base, but this material has generally been supplemented and reinforced by such special information and field investigations as the necessities in each case have required. Pursuit of this method of cost finding over the years has enabled us, with the assistance of the carriers, shippers, and other students of the subject, to make extensive progress in this field."

The Commission concluded that while perfection has not been attained the cost studies possess sufficient attributes of accuracy to enable it to reach the conclusion that the differences in territorial rates are not justified by consideration of differences in cost. The Commission said that out-of-pocket cost should ordinarily establish the floor of all rates. In concluding that the present class rates in Official territory are below the maximum reasonable level and directing an interim increase, the Commission said (p. 705, R. 320):

"This finding as to the justness and reasonableness of the intraterritorial official class rates is based in part upon a consideration of the returns from operation of the various respondents

in the several territories as reported to us, which we have considered pursuant to stipulations of record. From those returns and the whole record we find and determine that the revenue needs of the carriers in Official territory with respect to their class-rate traffic are greater than is the case as to the class-rate traffic of the carriers in the other territories described."

THE FINDING THAT EXISTING RATES ARE UNDULY DISCRIMINATORY, IN VIOLATION OF THE ACT, FINDS AMPLE SUPPORT IN THE RECORD.

Before discussing the evidence before the Commission we wish to call attention to a recent decision of this Court, outlining the functions of the Commission and of the court in determining the existence of preference or discrimination. In *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, the Commission had held that certain tariffs filed by forty-one interstate common carriers by motor vehicles were unlawfully discriminatory. No shipper had complained and there was no evidence except that offered in support of the tariffs. The District Court held the order void and perpetually enjoined its enforcement. This Court, in reversing the District Court, in a unanimous opinion, made the following clear statement as to the authority of the Commission to determine the question of discrimination, at page 352:

"'It is not disputable that from the beginning the very purpose for which the Commission was

created was to bring into existence a body which from its peculiar character, would be most fitted to primarily decide, whether from facts, disputed or undisputed, in a given case, preference or discrimination existed.' (United States v. Louisville & N. R. Co., 235 U. S. 314, 320, 59 L. Ed. 245, 250, 35 S. Ct. 113.) And where a court substituted 'its judgment as to the existence of preference for that of the Commission, on the ground that where there was no dispute as to the facts it had a right to do so (the court), obviously exerted an authority not conferred upon it by the statute.' So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathemetical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust', 'unfair' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination."

Later in the opinion the court disposed of the contention, which is likewise here made, that the Commission acted without complaints by individual shippers. Here it is repeatedly alleged that no one requested

an increase in the class rates in Official territory and the following extract from the court's opinion disposes of this contention and also points out that the Commission has authority, in its capacity as a public agency, to act "in the interest of shippers, generally, the national transportation system, and the public interest." The court said at page 353:

> "The fact that the Commission acted on its motion without complaints by individual shippers did not detract from the Commission's power to protect and maintain a transportation system free from partiality to particular shippers. The Commission acted in its capacity as a public agency and carried out duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest. Its order was the embodiment of the Commission's judgment that the proposed tariff was a discrimination prohibited by the Act. 'The judgment so exercised, being supported by ample evidence, is conclusive.'"

We come now to consider just what evidence the Commission had before it to support its judgment that the existing rates resulted in undue discrimination and preference, in violation of Section 3 of the Act. It is clearly not feasible to recite all or any substantial part of the voluminous evidence that the Commission had before it in the 5,490 pages of testimony, the 233 statistical exhibits, all of which are now before the court, together with the reports showing the financial results of the railroads' operation subsequent to the closing of the hearings. Much of this evidence is recited in

the brief for the Government and the Interstate Commerce Commission and will not be repeated here. To us it would seem, necessary only to consider the sufficiency of the evidence as recited by the Commission in its report. Surely it will not be contended that the Commission's report recites and refers to evidence which was not, in fact, before it, but if it is so contended counsel should point out in what particulars the Commission refers to evidence that was not before it. While the stereotyped allegation is repeatedly made that "there is no evidence sufficient to support a finding, etc.," yet it seems clear that the quarrel is rather with the deductions which the Commission makes from the evidence than with the fact of the existence of evidence.

EXISTENCE OF DISCRIMINATION ESTABLISHED BY DISPARITY IN RATES.

In the first place, the evidence shows a widespread disparity in the class rates within the various rate territories and shows that much the lowest scale applies in Official territory. A comparison of the first-class rates in the various class rate scales show that the Southern Scale is 137.7% of the Official, the Western Trunk Line scale is 129.6 for Zone 1, 144.4 for Zone 2, and 159.4 for Zone 3.

The interterritorial class rates represent a sort of blending of the intraterritorial scales of class rates applicable in the origin and destination territories, generally resulting interterritorial rates lower than those which prevail in the higher-rated territory, but higher

than in the lower-rated territory. However, there is a tendency for them to be closer to the level of the higher-rated territory. Generally speaking, they do not properly blend the intraterritorial levels and the rates are usually higher than rates which reflect the respective intraterritorial levels in proportion to the distance hauled in each territory. As illustrative the Commission found, at page 600 of the report (R. 217), that the blending of the Southern and Eastern class rate scales result in interterritorial rates generally lower than those prevailing in the South, but in some instances, particularly for the longer distances, the interterritorial rates exceed those in the Southern Scale. Illustrative comparison of the differences are shown on page 601 and Appendix 9 of the report (R. 216, 362). The result of this method of making interterritorial rates is that the class rates in Official territory are lower than from the South and West into that territory, while the rate from Official territory to the South and West are lower than within the latter territories. Thus it is that the South and West are at a disadvantage in competing with Official territory whether they ship to points in official territory or to points within their own territory. The evidence as to the disparity in rates is recited and discussed at pages 566 to 571, inclusive (R. 181-186), and again at pages 600 to 604, inclusive (R. 215-219), and an actual comparison of intraterritorial scales is set forth in Appendix 8 to the report (R. 359), while comparison of specific interterritorial rates, is set forth in Appendix 9 to the report (R. 362).

The wide disparity in the rates clearly establishes discrimination, but not all discrimination is undue and it was necessary for the Commission to consider other evidence to determine whether the discrimination resulting from the disparity was undue or unlawful. It was contended by the beneficiaries of the discrimination that same was justified on two principal grounds: (a) differences in transportation conditions or cost of the service, and (b) differences in the composition of traffic and the methods used in establishing the rate structures in the different territories.

DISCRIMINATION NOT JUSTIFIED BY DIFFERENCE IN COST OF SERVICE.

In order to determine whether the discrimination was justified by differences in cost or transportation conditions the Commission directed the Cost Section of its Bureau of Transport Economics and Statistics to prepare and present an analysis of the costs in the different territories. We have dealt with this cost study elsewhere and suffice it to now say that it was the most complete and detailed cost study that has ever been presented to the Commission. It withstood all attacks made with all the ingenuity of the best railroad accountants in the United States. It was prepared by independent accountants having no interest in the result that might be shown.

As appears from the Commission's report the cost study showed that there was no substantial difference in cost throughout the territory east of the Mississippi River, while the cost west of the Mississippi River is

somewhat higher. The evidence as to the cost of rendering the transportation service and as to whether the disparity in rates is justified by difference in cost is recited and discussed at pages 571-591 (R. 186-206), inclusive, and again at pages 692-694 (R. 307-309), of the Commission's original report.

After reciting the principles to be applied in the use of cost studies in making rates, the Commission summed up its finding on the question of whether the disparity in rates was justified by the cost of service in the following language (Original report 694, R. 309):

> "Applying the foregoing principles to the issues in this proceeding, there is no doubt that, based on cost of service considerations, the difference in levels, schemes, and progressions of scales that at present occur in the several territorial class-rate structures here under review are not justified."

Certainly this finding is amply supported by the evidence and, in fact, the evidence would not support any other conclusion.

DISCRIMINATION NOT JUSTIFIED BY DIFFERENCE IN CONSIST OF TRAFFIC OR DISTRIBUTION OF TRANSPORTATION BURDEN.

The Commission also considered at length evidence on the question of consist of traffic and the methods of rate-making or difference in distribution of transportation burden, to determine whether the discrimination resulting from the disparity in rates is justified

by these considerations. The evidence before the Commission on this subject was quite voluminous. It is recited in part and discussed by the Commission at pages 610 to 613 (R. 225-228), inclusive, of the original report, and also at pages 694 to 697 (R. 309-312). A table on page 611 (R. 226), taken from an exhibit submitted by the southern carriers and based on the Commission's freight commodity statistics for the year 1939, shows the consist of traffic in the various territories by groups of commodities. It will be seen from this table that as to "manufacturers and miscellaneous," which is the high-grade traffic usually moving on class rates, there is little difference in the various territories. For example, this group constitutes 26.89 per cent of the tonnage in Official territory, including the Pocahontas region, 27.21 percent of the tonnage in the Southern region and 29.38 per cent in the Western region. The evidence showed that there was not as great difference in the consist of the traffic as between the territories as there is within regions and between individual railroads operating in the same territory. Also the evidence showed that there was a large movement interterritorially and, of course, as to this interterritorial traffic the consist thereof is common to both of the territories between which it moves.

The Commission concluded from all this evidence that there was no such difference in the consist of traffic or the distribution of the rate burden as would justify the disparity in rates. The ultimate conclusion of the Commission upon consideration of cost of service, consist of traffic, and distribution of rate burden,

is stated on page 696 of the original report (R. 311) as follows:

> "Considerations of costs of service, consists of traffic, distribution of the rate burden, and other factors usually given weight in determining lawful rates justify the conclusion that the class rates within southern, southwestern, and western trunk-line territories, and between those territories and official territory are unjust and unreasonable, *and that the class rates to official territory from the other territories are unduly prejudicial to such other territories and unduly preferential of official territory.*"

In view of the voluminous evidence that was before the Commission bearing on all of these subjects, we submit that it is impossible to say that this ultimate conclusion of the Commission is without support in the evidence.

OTHER EVIDENCE SUPPORTING THE FINDING OF UNDUE DISCRIMINATION.

There was much additional evidence which served to establish the existence of discrimination, such as (a) the effect of the existing class rate structure upon the carriers, producers, shippers and consumers and the various localities and territories, and (b) the growth and development of the several areas in terms of agricultural, forest, mineral production, manufacturing and distribution of population, and (c) the effect of the operation of the varying class rate structures over a period of more than twelve years. The

Commission sums up all of this evidence as follows (687-89, R. 302-304):

> "Appropriate to the breadth and variety of the interests involved in this proceeding, the record has not been narrowly restricted to rate comparisons and the competitive and other effects of rates upon particular industries or individual shippers, but has been developed within a sufficiently broad perspective to permit us to consider all the essential circumstances and conditions which affect the welfare of carriers, of producers, shippers, and consumers, and of localities, districts, regions, and territories. More specifically, cost of service has been explored and analyzed more comprehensively and thoroughly than in any other similar investigation. Studies and analyses have also been made of the natural resources of the areas concerned and of the growth and development of these areas in terms of agricultural, forest, and mineral production, manufacturing, and distribution of population. Other analyses have dealt with the composition and movement of traffic and with employment, labor, and income.
>
> "The record also affords us an opportunity to analyze and appraise the functioning over a period of more than 12 years of different territorial class-rate structures. It enables us also to compare the results of such a test one with another, to check such results with the purposes intended to be accomplished when these rate structures were prescribed, and on the whole to translate into our conclusions all the lessons thus learned by experience."

THE EVIDENCE SUPPORTS THE FINDING THAT THE EXISTING CLASS RATE STRUCTURE RESULTS IN INJURY TO SOUTHERN AND WESTERN TERRITORIES AND PREFERENCE TO OFFICIAL TERRITORY.

The record shows that there is competition for the sale of products in each of the territories by the producers in all of the territories. In other words, southern producers ship into Official territory, and the West. Official territory producers compete in the markets in the South and West and Western territory producers compete in the markets in Official territory and Southern territory. This being established, it necessarily follows that the producers having the lowest rates are preferred to the prejudice of those paying higher rates. In *Northeast Kentucky Coal Bureau* v. *Chesapeake & O. Ry. Co.*, 206 I. C. C. 445, 448, the Commission held:

> "Even though complainant's members may not be injured, their competitors are preferred. Preference, not necessarily injurious in itself, affords opportunity to gain success over and injure the other party. The act is specifically directed against undue preference and all other forms of unjust treatment of the shipping public."

The order of the Commission in this case was upheld in *Chesapeake & O. Ry. Co.* v. *United States*, 296 U. S. 187. However, the evidence here shows not only that Official territory is preferred but also that the South and West are prejudiced. This is particularly

true in the markets within Official territory. The Commission, at page 696 of the original report (R. 311), found:

> "Official territory is the greatest consuming territory in the country, and is the market that nearly all manufacturers desire to reach, particularly where they have a surplus of their products to sell. In shipping to official territory, manufacturers in the other territories not only have the disadvantage of location, but are subjected to an additional burden in those instances where they must pay class rates on a much higher level than their competitors in official territory. This situation reacts to the disadvantage of manufacturers in the other territories, and to the advantage of those in official territory, tends to restrict the growth and expansion of the manufacturers in other territories, and, to some extent, to prevent the establishment of new manufacturing plants in those territories."

This finding is amply supported by the record. In the first place, it cannot be denied that Official territory is the greatest consuming territory in the country, nor that the class rates from the South and the West into that territory are on a higher level than the rates within that territory. This being true, it would not seem to require evidence to show that the South and West are prejudiced in shipping into Official territory because such prejudice is inherent in the admitted facts. However, there was much evidence of the actual results in this discrimination and this evidence is recited throughout the report.

It is earnestly argued that because the movement of traffic from the South to Official territory on class rates is small there can be no finding of injury, but this misses the main point of the injury because the injury arises out of the failure of the traffic to move on class rates from the South to the North and that failure is due to the relatively high measure of the rates. It is claimed, however, that the small volume of the movement indicates that the carriers have established lower exception commodity rates on which the traffic does move. The record fails to support this contention, although it does show that some large shippers have been able to secure exception or commodity rates on their particular traffic which enables it to move, but the small shipper who wants to establish a plant in the South doesn't know how to go about securing these exceptional rates and therefore is restrained from attempting to establish a plant. Just the contrary is true as to the small shipper in Official territory because class rates are established on which he can ship and these rates are charged to all shippers. Can it be said that a situation such as this does not result in injury to Southern territory, even though there may be but a small movement on the present relatively exorbitant rates.

THE SAME CARRIERS OR GROUP OF CARRIERS CONTROL THE CLASS RATES WITHIN OFFICIAL TERRITORY AND BETWEEN THAT TERRITORY AND THE OTHER TERRITORIES AND ARE RESPONSIBLE FOR THE DISCRIMINATION FOUND TO EXIST.

It is urged by appellants that the Commission was without authority to make a finding of undue discrimination and an order requiring its removal because there was no evidence sufficient to support a finding that the same carrier or group of carriers control the levels of the class rates in the several territories. As had already been pointed out, the only finding of undue discrimination under Section 3 of the Act is as to the relation of the rates within Official territory to the rates from other territories into Official territory. It is obvious that the carriers in Official territory control both sets of rates and no finding by the Commission to that effect was necessary because those carriers admitted the common control. At page 639 of its original report (R. 254) the Commission said:

> "The carriers in official territory argue that the maintenance of higher class rates in other territories than apply within official territory cannot constitute undue preference or prejudice, inasmuch as the railroads that serve official territory do not control the rates applicable within other territories. *They do not deny, however, that they are jointly responsible with the railroads in other territories for the maintenance of interterritorial rates.*" (Italics ours.)

Not only did the Official territory carriers admit their common control over the rates found to be unduly discriminatory, but they have not contested either the finding that those rates result in undue discrimination or the method prescribed by the Commission for removing the discrimination. In *Sprunt & Son* v. *United States*, 281 U. S. 249, it was held that the shipper may not attack an order requiring the removal of discrimination where the carriers have voluntarily complied with the order. The application here of the principle of the *Sprunt case* will be more fully discussed in a later chapter. It is contended, however, that the *Sprunt case* is not here applicable because the western railroads join with the shippers in their atack on the Commission's order. However, the western railroads are not attacking that portion of the order here involved which requires an increase in the rates in Official territory, nor the reduction in the rates from the South into Official territory and would have no standing to make such an attack because they are not parties to either of those rates. They do attack the reduction in the rates within Western territory and between that territory and other territories, including Official. A reduction in all interterritorial rates is required upon a finding that those rates are unreasonable, in violation of Section 1, and as to the interterritorial rates into Official territory on the further finding that they are unduly discriminatory, in violation of Section 3. As to these latter rates the western carriers being necessary participants therein, are a party to the discrimination although control of the dis-

crimination is in the hands of the Official territory carriers. See *United States v. Illinois Central*, 263 U. S. 515. The Commission found that these interterritorial rates "are not a loose aggregation of separately established rates but a single entity composed of interrelated rates," and therefore there is a common source of discrimination for which the carriers as a group are responsible.

It is therefore respectfully submitted that the carriers charged with the discrimination, having admitted their responsibility therefor and not having contested the method prescribed for its removal, appellants will not be heard to contend that the order is invalid because there is no common control of the rates found to be discriminatory and that aside from the admission, common control is shown to exist, particularly in view of the Commission's finding that the rates involved "are not a loose aggregation of separately established rates, but a single entity composed of inter-related rates" (p. 690, R. 305).

HAVING FOUND PRESENT RATES ARE IN VIOLATION OF SECTION 3, THE COMMISSION HAD AUTHORITY TO PRESCRIBE RATES TO CURE SUCH VIOLATION.

Appellants contend that the order of the Commission prescribing rates to remove the discrimination found to exist is invalid and beyond the Commission's authority because it fails to leave with the railroads the alternative method of removing the discrimination. The same contention was pressed before the Commis-

sion in the petitions for rehearing and again before the Court below. In overruling the contention the Commission said (Supplemental Report, pp. 60, 61, R. 464, 465):

> "It is not necessary again to review the evidence as to the unreasonableness of the class rates brought in issue in these proceedings, or as to the undue preference and undue prejudice caused by and resulting from such rates, which we have found to exist. Having made the findings of unlawfulness, we have authority under section 15(1) of the act and under section 5(b) of the Transportation Act of 1940, to prescribe the method for removing such unlawfulness, and to prescribe the rate levels or the rates which we find to be necessary to remove it. We may, by order, prescribe maximum or minimum or maximum and minimum rates to remove any unlawfulness, and such order need not provide for an alternative method.
>
> "In support of the contention that an alternative method of removing undue preference and undue prejudice must be provided, petitioners refer to *Texas & P. Ry. Co.* v. *United States*, 289 U. S. 627, in which the Court stated that 'where an order is made under section 3, an alternative must be afforded.' In a footnote to that statement, however, the Court said: 'That is not true of an order pursuant to Sec. 15 (1) prescribing maximum or minimum or maximum and minimum rates; but the present orders were not issued under that section.' See also *Youngstown Co.* v. *United States*, 295 U. S. 476."

The District Court disposed of this contention in a brief paragraph, stating (p. 875; R. 1438):

"Nor is the order erroneous because the carriers were not allowed any alternative method for the removal of the discriminations which make the present class rates unlawful. This was a rate order made under Par. 15 and not an order under Par. 3 in which an alternative must be provided as held in Texas & Pacific R. v. United States, *supra*."

It will thus be seen that both the Commission and the District Court held that the order was made under Section 15 and not under Section 3 and this would seem to dispose of the question since Section 15 specifically authorizes the Commission, upon a finding by it that existing rates are or will be "unjust or reasonable, o unjustly discriminatory or unduly preferential or prejudicial," to prescribe the rates to be charged for the future.

Apparently the contention of the appellants is that no order may be made under Section 15 to cure a violation of Section 3, but Section 15 clearly provides to the contrary. In fact, all rate orders of the Commission must be issued pursuant to the authority granted by Section 15 (1) of the Act since no other section of the Act provides for such orders. Section 3 does not provide for any order, nor does Section 1. These sections impose a duty upon the carriers to charge rates that shall be just and reasonable and free from undue prejudice or preference and provide that it shall be unlawful to charge rates that are unjust or preferential. There is, therefore, confusion in the statement, sometimes made, that an order is issued under Section 3 and not

under Section 15. Thus in the *Youngstown case*, 295 U. S. 476, the Court said at page 480:

> "There is no merit in the contention that the order was a Section 3 order and invalid for failure to afford the carriers an alternative of raising the contested rate or lowering others to remove discrimination. It is true the Commission found prejudice to shippers all rail but in essence the order entered was a Section 15 order and not one made under Section 3."

Of course, the order there was made under Section 15, as all rate orders must be, and the Court evidently intended to hold that the order was made to correct a violation of Section 1 rather than Section 3 and that therefore the question of affording an alternative was not presented.

It is further contended, however, that where the order is issued under Section 15, pursuant to a finding of violation of Section 3, that the defendants must be allowed an alternative method of removing the discrimination either by lowering the higher rates or increasing the lower rates. This was the law prior to the enactment of the Transportation Act of 1920, but we do not believe that it is now the law. On the contrary, the Act specifically provides that where undue discrimination is found the Commission may prescribe the reasonable rates to be thereafter charged. This is the plain language of the Act, which provides as follows:

> "Sec. 15 (as amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, August 9, 1935, and September 18, 1940) (U.

S. Code, Title 49, Sec. 15). (1) That whenever, after full hearing, upon a complaint made as provided in Section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable *or unjustly discriminatory or unduly preferential or prejudicial,* or otherwise in violation of any of the provisions of this part, *the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates fares, or charges, to be thereafter observed in such case,* or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation *other than the rate, fare, or charges so prescribed,* or in excess of the maximum or less than the minimum so prescribed,

as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." (Italics ours.)

It will be noted that the provisions of the Act are in the disjunctive and that it is specifically provided that where the Commission finds the rates to be "unjustly discriminatory or unduly preferential or prejudicial" the Commission has authority "to determine and prescribe what will be a just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed." In other words, Congress has provided that while the carriers may initiate rates yet if the rates so initiated are found to be unjustly discriminatory or unduly preferential or prejudicial, the Commission may then substitute its judgment for that of the carrier "and prescribe what will be the just and reasonable * * * rates, fares, or charges, to be thereafter observed." The Commission is not confined to the prescription of minimum rates or maximum rates, but may prescribe *the* rates to be charged, the only limitation being that the rates prescribed must be "just and reasonable."

Appellants rely upon the *Texas & Pacific Case*, 289 U. S. 627, and we concede that there is language in the majority opinion which sustains their position, but there the Commission had not prescribed rates and had left to the carriers the method of removing the discrimination. The question was whether the carriers against whom the order ran had control over both rates and it was held that the complaining carriers controlled only one of the rates from which the discrimination

resulted and therefore in no event could the alternative be afforded and it is in the light of this holding that the majority of the court used the following language so often quoted by appellants (650):

> "Where an order is made under Section 3 an alternative must be afforded. The offender or offenders may abate the discrimination by raising one rate, lowering the other, or altering both."

Had the question been as to the authority of the Commission to prescribe rates to remove a discrimination properly found to exist, it is difficult to believe that the court would have made the statement which is clearly contrary to the express provisions of Section 15(1).

Moreover, the court was careful to point out in a footnote (p. 650), following the statement that the alternative must be granted where an order is made under Section 3, that "this is not true of an order pursuant to Section 15(1) prescribing maximum or minimum or maximum and minimum rates; but the present orders were not issued under that section."

The minority opinion, by Justice Stone, in which Chief Justice Hughes and Justices Brandeis and Cardoza concurred, held that the carriers in question could control both rates and that in such situation it is not necessary in cases arising after the enactment of the Transportation Act of 1920, that the carriers be afforded an alternative method of removing undue discrimination found to exist. The minority opinion states (668):

"But the statute does not compel the Commission to afford such an alternative or permit an offending carrier to avoid its salutary provisions merely for the reason that, although participating in both the offending rates, it can with certainty control only one. It is true that in cases arising before the enactment of Transportation Act, 1920, by which power was given to the Commission to fix a minimum rate, it could not remove a discrimination by prescribing a minimum rate to one of the competing localities. But it could remove the discrimination by imposing a lower maximum rate, even though a joint rate participated in by the carrier whose rails did not reach the locality discriminated against (compare St. Louis, S. W. R. Co. v. United States, *supra*), or, as already mentioned, it could leave the carriers free to remove the discrimination by raising one or lowering the other. See American Exp. Co. v. South Dakota, *supra* (244 U. S. 624, 61 L. ed. 1357, 37 S. Ct. 636, P. U. R. 1917F, 45); United States v. Pennsylvania R. Co., 266 U. S. 191, 69 L. ed. 243, 45 S. Ct. 43. And now that the Commission has power under sec. 15 (1) to fix a minimum rate *it may equally command the removal of the discrimination by directing a rate to be raised*, just as where the carrier maintains discriminatory practices the Commission may direct the modification of one and not the other, *and is not bound to allow the carrier a choice*. Merchants Warehouse Co. v. United States, *supra* (283 U. S. 513, 75 L. ed. 1238, 51 S. Ct. 505); New York, N. H. & H. R. Co. v. Interstate Commerce Commission, *supra* (200 U. S. 404, 50 L. ed. 526, 26 S. Ct. 272)." (Italics ours.)

It will be noted that the opinion points out that prior to the enactment of the Transportation Act of 1920, the Commission could remove the discrimination "by imposing lower maximum rates" but that subsequent to the enactment, which gives the Commission the power to fix minimum as well as maximum rates, the Commission "is not bound to allow the carrier a choice."

Of course, undue discrimination arises out of the relationship of rates and can exist only where it can be cured by a change in relationship, however brought about. It does not follow, however, that the carriers which created the unlawful relationship must be left free to determine how it should be cured. Prior to the Transportation Act of 1920, the law left the carriers free to determine the method of removing the discrimination but by the provisions of Section 15(1) in that Act, the Interstate Commerce Commission was expressly authorized to determine the method of removing the discrimination by prescribing the rates to be thereafter charged.

In numerous cases since the decision in the *Texas & Pacific Case* the Commission has found rates and practices of the carriers to be unduly discriminatory and ordered them discontinued without affording the carriers any alternative and this Court has upheld such orders. In *Diamond Tank Transport* v. *United States*, 23 Fed. Supp. 497, the court stated, at page 501:

> "* * * if it finds that such rates are 'unjust or unreasonable or unjustly discriminatory * * * the Commission is authorized and em-

powered to determine and prescribe what will be the just and reasonable * * * rates, fares, or charges, to be thereafter observed.' "

This case was affirmed by this Court by *per curiam* opinion 305 U. S. 367.

In *Baltimore & Ohio v. United States*, 305 U. S. 507, the court upheld an order of the Interstate Commerce Commission ordering the carriers to cease and desist from furnishing certain shippers storage space in warehouses, buildings or on piers owned and controlled directly or indirectly by such carriers at rates and charges which failed to compensate said carriers for the cost of providing said space. No alternative was granted because it appeared that certain shippers were not in position to use such services and were discriminated against by the carrier furnishing same to other shippers at less than cost. The court said, at page 524:

> "The power, however, is in the Commission, whenever it is of the opinion that any practice is unjust, unreasonable, preferential or otherwise violative of the Act, to prescribe what practice will be just, fair and reasonable."

In *United States* v. *C. M. St. P. & P. R. Co.*, 294 U. S. 499, the court stated, at page 505, the effect of Section 15 as follows:

> "Section 15 (subdivisions 1 and 7) is to the effect that the Commission shall have power to determine the just and reasonable rate when a rate in force or proposed is found to be unjust and un-

reasonable or *unduly discriminatory or otherwise unlawful.*" (Italics ours.)

In *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, the court upheld the order of the Interstate Commerce Commission, which ordered cancelled the tariffs of certain motor carriers on the ground that same created discrimination. No alternative was granted and the court held that the Commission had the power to enter the order cancelling the tariffs in order to remove discrimination.

It is therefore submitted that having found the existing class rates to be unjustly discriminatory and unduly preferential and prejudicial, the Commission had authority to enter an order prescribing rates to remove such unlawfulness, subject only to the requirement that such rates shall be just and reasonable.

IN VIEW OF THE ACQUIESCENCE OF THE OFFICIAL TERRITORY CARRIERS IN THE INCREASE IN THEIR CLASS RATES THE APPELLANTS WILL NOT BE HEARD TO OBJECT THAT THE ORDER OF THE COMMISSION FAILS TO GIVE SUCH CARRIERS AN ALTERNATIVE IN REMOVING THE UNLAWFUL DISCRIMINATION.

The Official territory carriers filed no petition with the Interstate Commerce Commission for reconsideration of so much of its report and order as required them to increase rates in Official territory by 10%. Neither have they appeared in this proceeding, but, on the contrary, they have filed with the Interstate Com-

merce Commission tariffs increasing the rates as required by the Commission's order.

The appellant states and their shippers therefore find themselves in the same position that were the shippers in *Sprunt & Son* v. *United States*, 281 U. S. 250, 74 L. Ed. 832. There the Commission had found a violation of Section 3 and ordered it removed by increasing the lower rate and somewhat reducing the higher rate. The Order of the Commission was attacked in the courts by both the shippers, whose rate was ordered increased, and the railroads. The lower court upheld the order and only the shippers appealed, the railroads abandoning the litigation and proceeding to publish the rates. This Court held that the result of this action on the part of the railroads was to leave the shippers in the same position they would have been had the railroads voluntarily established the rates, and that if the shippers believed the new rates to be unreasonable or unjust, their remedy was by complaint before the Commission. In its opinion the court states, at page 255:

> "Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy (citing cases). The appellants' position is legally no different from what it would have been if the carriers had filed the rates

freely, pursuant to an informal suggestion of the Commission or one of its members; or if the filing had been made by carriers voluntarily after complaint filed before the Commission, which had never reached a hearing, because the rate structure complained of was thus superseded. The carriers who were respondents before the Commission filed the new rates, presumably because they now desire them. Nothing to the contrary is shown. As far as the carriers are concerned, it is as if the new rates had been filed wholly of their own accord and as if there had never been a controversy before the Commission. Since the appellants' economic advantage as shippers was an incident of the supposed right exercised by the carriers, the appellants cannot complain after the carriers are satisfied or prefer not to press their right, if any."

The distinction between the right of the shipper to attack an order of the Commission with which the carriers had complied, on the ground that the rates are unreasonable or unjust and their right to attack such order on the ground that the Commission exceeded its authority, is drawn by the Supreme Court in the *Youngstown case, supra,* where the *Sprunt case* is distinguished. In *Algoma Coal & Coke Co. v. United States,* 11 Fed. Supp. 487, the right of a shipper to attack a general rate order, such as that here, was denied because the shipper had still the right to attack any particular rate as unjust or unlawful. The Court distinguishes the *Youngstown case* on the ground that a particular rate was there definitely prescribed.

The opinion of the court in the *Sprunt case* shows that those railroads went much further to avoid compliance with the order than have the eastern railroads here. They even went so far as to join in a suit to set the order aside and pressed it until the decision of the lower court upholding the order, while here the eastern railroads did not even file with the Interstate Commerce Commission a petition for rehearing on this question. They orally announced to the lower court that if the interlocutory injunction was granted they would make application to postpone the effective date of their tariffs pending disposition of the case by the court, but further than this they have never gone either orally or in formal pleading. Certainly if the court could conclude that under the facts in the *Sprunt case* the action of the railroads in publishing the increased rates was voluntary, it must be conceded that here the grounds for so concluding are very much stronger than in the *Sprunt case*.

In view of the action of the Official territory lines in accepting the decision of the Commission, the appellant states and their shippers are left in the position where they can only complain if the rates to be published by the carriers are unreasonable or unjust, and therefore their attacks upon the power and authority of the Commission to make the order in question cannot prevail.

IT WAS NOT NECESSARY, IN ORDER TO PRESCRIBE INCREASED RATES, THAT THE COMMISSION FIND EXISTING RATES WERE NOT COMPENSATORY OR WERE SO LOW AS TO CAST A BURDEN ON OTHER TRAFFIC, OR THAT SUCH RATES ARE NECESSARY TO PREVENT A THREATENED RATE WAR.

All of the appellants lay great stress on the fact that the Commission failed to find that the class rates in Official territory are non-compensatory or threatened to cause a rate war, and contend that such finding is necessary to that part of the order increasing rates in Official territory. We have already discussed the authority of the Commission to prescribe rates to cure a violation of Section 3 and have shown that the Commission is authorized to do so pursuant to Section 15(1). Appellants, however, deny the authority of the Commission to prescribe such rates to cure a violation of Section 3 and contend that in order to prescribe increased rates under Section 1 the Commission would have to first find that existing rates (a) were not compensatory or (b) were so low as to cast a burden on other traffic, and reliance is again had upon the case of *Texas & P. R. Co.* v. *U. S.*, 289 U. S. 627. We submit that this is too narrow a view of the powers of the Commission.

It is to be kept in mind that here the Commission had before it the entire class rate structure east of the Rocky Mountains and was called upon to consider the reasonableness of rates not only from the standpoint of the particular carriers charging them, but from the

point of view of all other carriers and not only from the standpoint of given localities to which such rates applied, but also from the standpoint of all localities in the territory involved. (That is exactly what the Commission did in each of the previous class rate investigations, except the areas were smaller.) This was the right and duty of the Commission under the declaration of national transportation policy announced by Congress September 18, 1940, and under the admonition of the Hoch-Smith Resolution that the Commission shall give consideration "to a natural and proper development of the country as a whole, and to the maintenance of an adequate transportation system." It was the duty of the Commission to consider all of the rates involved and their relation to each other and determine which, if any of them, were unreasonable, and if it found any of them to be unreasonable or unjust it was the duty of the Commission, under Section 15 (1), to prescribe the rates that would remove the unlawfulness, subject only to the condition that the rates so prescribed must be "just and reasonable."

We think this case clearly falls within the principles laid down by this Court in *Youngstown Steel & Tube Co.* v. *U. S.*, 295 U. S. 476, which was decided by a unanimous court subsequent to the decision in the *Texas & Pacific Case*, upon which reliance is had, the opinion of the court having been written in both cases by Mr. Justice Roberts. In the *Youngstown Case*, the court said, at page 479:

> "The Commission finds: These prescribed minima are reasonable; lower rates would create

undue discrimination against shippers in origin districts who cannot use the water-rail route, and would tend to disrupt the rate structure, and to destroy the proper differentials between various producing districts on shipments to Ohio destinations. These findings have ample support in the evidence."

It will be noted that the Commission had made no finding that the proposed lower rates were not compensatory or were so low as to cast a burden on other traffic.

In considering whether the findings of the Commission were sufficient to support its order prescribing minimum rates and in holding that they were sufficient, the court said, at page 480:

"In the first place the Commission here found the required minimum reasonable; in the second place, it had, after full investigation in this and the Ohio case held the existing rate structure—built upon certain reasonable key or controlling rates by application of proper differentials—just and reasonable, and the ex-river rates here in issue, in contrast, too low. Comparisons of other rates in the same or adjacent territory, while not a conclusive test of reasonableness of a rate under investigation, have probative value. There was much other evidence bearing upon the character of the service and cost. The order of the Commission was based primarily upon the reasonableness of the minimum prescribed. The existing rate structure furnished support for the finding of reasonableness."

Here the Commission found the increased rates to be reasonable. Here, as in the cited case, the Commission had made a full investigation into the existing rate structure and a comparison of the rates with other rates "in the same or adjacent territory." Here, as there, "there was much other evidence bearing upon the character of the service and cost" and here, as there, "the existing rate structure furnished support for the finding of reasonableness."

In the *Texas & Pacific Case* no specific rates were prescribed, but the carriers were ordered to maintain certain differentials. The statement of the Court that since there was no evidence that the rates were not compensatory and the Commission refused to find that they were so low as to cast a burden on other traffic, "There was therefore no basis for an order fixing minimum reasonable rates under Section 15 (1) of the Act," was clearly *obiter,* especially since in that case the issue of unreasonableness under Section 1 was withdrawn. Even so, it is far from saying that the Commission may not, under any circumstances, order rates increased without such findings. If that language is to be construed as so limiting the Commission's authority it is in direct conflict with the later *Youngstown Case,* the opinion in which was written for the Court by the same Justice.

The action of the Commission in prescribing the increased rates in Official territory is also sustained by the decision of the Three Judge Court, sitting as a District Court for the Northern District of Ohio, in the case of *Jefferson Island Salt Mining Co. v. U. S.,* 6

Fed. (2d) 315. The facts in that case are strikingly similar to the facts here. In the proceeding there under review the Commission had before it all shippers and interstate carriers of salt east of the Rocky Mountains. The Commission prescribed minimum rates which were an increase in the rates from Detroit to Chicago and from Louisiana to Chicago. The Louisiana shippers attacked the order of the Commission as being beyond the power of the Commission since it had made no finding that the existing rates were non-compensatory or cast a burden on other traffic and charged that the Commission's order was not a regulation of freight rates but a regulation of competition between carriers and producers of salt and a substitution of the Commission's own rate-making policy, with a view to the parceling out of markets. This is in substance the argument now made here *but* after stating the argument, the court said, at page 317:

> "In our opinion, these arguments are not sound. They adopt too restricted a view of the powers conferred on the Commission by the Interstate Commerce Act, particularly by the amendments thereto made in the Transportation Act of 1920. The enlarged power conferred by amended sections 13, 15 and new 15a, is overlooked. Section 13(4), being U. S. Comp. St. Ann. Supp. 1923, sec. 8581, confers power on the Commission to prescribe minimum as well as maximum rates, whenever it finds any existing rate causes any undue or unreasonable advantage, preference, or prejudice, or any undue or unreasonable discrimination as between persons or localities in intra-

> state commerce, on the one hand, and interstate or foreign commerce, on the other. Section 15 (1) being U. S. Comp. St. Ann. Supp. 1923, sec. 8583, empowers the Commission, whenever it finds that any existing rate is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, to prescribe what will be a just and reasonable rate to be observed in the future, or the maximum or minimum rate thereafter to be charged. By these sections the Commission is empowered to raise the rates, not merely because non-compensatory to the carrier receiving them, but because they are unjust or unreasonable from the point of view of other carriers and localities."

It will be seen that the Court expressly holds that since the Transportation Act of 1920, the Commission "is empowered to raise the rates, not merely because non-compensatory to the carrier receiving them, but because they are unjust or unreasonable from the point of view of other carriers and localities."

In the case of *Anchor Coal Co.* v. *U. S.*, 25 Fed. (2d) 462, in which case the order of the Commission prescribing minimum rates in the lake cargo coal adjustment was enjoined, the court recognized the right of the Commission to prescribe minimum rates without finding that existing rates are unreasonable *per se*. The Court there said, at page 471:

> "Of course, since the passage of the Transportation Act of 1920 (49 U. S. C. A., Sec. 71, *et seq.*; Comp. St., Sec. 10071¼, *et seq.*), the Commission has the right to prescribe minimum rates, and we agree with the Commission that a construction of

the law is too narrow which limits its right to prescribe such rates to cases where the rates proposed are unreasonable *per se*, or are so low as to cast a burden on other traffic. It has the right to prescribe minimum rates also to prevent ruinous rate wars and to guarantee reasonable earnings, not only to the carriers affected, but also to competing carriers, who may labor under a higher cost of doing business. New England Divisions Case, 261 U. S. 184, 43 S. Ct. 270, 67 L. Ed. 605; Dayton-Goose Creek R. Co. v. U. S., 263 U. S. 456, 44 S. Ct. 169, 68 L. Ed. 388, 33 A. L. R. 472."

In *Scandrett* v. *U. S.*, 32 Fed. Supp. 995, affirmed 312 U. S. 661, the Commission had found the rates involved to be "compensatory considering all costs," but the Commission's order raising the rates was upheld on the ground that rates which are compensatory are not necessarily just and reasonable.

We therefore submit that it is well-established law that the Commission may prescribe minimum rates or precise rates, or prescribe an increase in rates without finding that existing rates are non-compensatory or are so low as to cast a burden on other traffic, and therefore the contention presented by the appellants is unsound, and the order of the Commission, made pursuant to a finding that the rates were unreasonable in their relation to other rates and to the entire rate structure, is a valid order.

In disposing of this question, the Commission in its supplemental report holds (p. 61; R. 465):

"In requiring an increase in rates to remove unlawfulness we are not required first to find that

existing rates, or proposed reduced rates initiated by carriers, are not compensatory. See *Petroleum between Washington, Oregon, Idaho, Montana,* 234 I. C. C. 609. We found in that proceeding that certain proposed reduced rates were compensatory, considering all costs, but that they were below a minimum reasonable level and hence unlawful. The order in that proceeding was sustained in *Scandrett* v. *United States,* 32 Fed. Supp. 995, and the judgment was affirmed by the United States Supreme Court in 312 U. S. 661. See also *Jefferson Island Salt Mining Co.* v. *United States,* 6 Fed. (2d) 315."

The Commission Has Not Prescribed Minimum Rates.

The argument that the Commission was required to find that existing rates were not compensatory or were so low as to cast a burden on other traffic, is, as we have seen, predicated on the assumption that the Commission here prescribed minimum rates and that such findings are necessary to support a minimum rate order.

The only order entered by the Commission relates to the temporary or interim adjustment. It is true that the order authorizes and directs that the class rates in Official territory shall be increased by 10% but such increased rates are not prescribed as minima, but are prescribed "to remove the unreasonableness in the rates and to bring to the minimum the undue preference and undue prejudice found to exist." The question therefore is not as to the findings that must be made to support a minimum rate order as that is

commonly understood, but as to whether the Commission had the authority to direct an increase in rates in order "to remove the unreasonableness in the rates and to bring to the minimum the undue preference and undue prejudice found to exist."

In prescribing rates, after finding a violation of the Act, the Commission is not necessarily exercising its authority to fix minimum or maximum rates but may be exercising the authority specifically granted in Section 15 (1) to "prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such cases." In so doing it is not necessary for it to find that any rate lower than the rate prescribed would be less than a reasonable minimum rate or to find that anything in excess of the rate prescribed would be higher than a maximum reasonable rate, but only that the prescribed rate will be "a just and reasonable rate." In other words, Congress has provided that while the carriers may initiate rates, yet if the rates so initiated are found to be unlawful the Commission may then substitute its judgment for that of the carriers "and prescribe what will be just and reasonable rates, fares, or charges to be thereafter observed." The Commission is not confined to the prescription of minimum rates or maximum rates, but may prescribe *the* rates to be charged, the only limitation being that the rates prescribed must be "just and reasonable." That comes within "the flexible limit of judgment which belongs to the power to fix rates" to which this Court alluded in *Atlantic Coast Line* v. *North Carolina Corporation Commission*, 206 U. S. 1.

THE EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT THE CLASS RATES IN OFFICIAL TERRITORY ARE LESS THAN JUST AND REASONABLE RATES AND SHOULD BE INCREASED.

In the foregoing chapters, in which we discuss the law governing the Commission's authority to order increases in rates to remove violations of Section 3 of the Act, we have pointed out much of the evidence which supports the findings of unreasonableness in violation of Section 1. We have shown that the Commission had before it the entire class rate structure east of the Rocky Mountains and therefore had to consider the reasonableness of the rates in relation to each other and in their effect upon other carriers and localities. The evidence shows, without contradiction, that the rates in Official territory were substantially lower than any rates charged for similar services any place in the United States. While a comparison of rates is ordinarily not a conclusive test, although having probative value, yet where, as here, the showing that the rates in question are lower than all other class rates in all other territories and all interterritorial rates for similar services, certainly constitutes substantial evidence that such rates are too low. In *Louisville & Nashville R. Co.* v. *United States,* 238 U. S. 1, the court said, at page 15:

> "Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of

> either, it is still true that, when one of many rates is found to be higher than all others, there may arise a presumption that the single rate is high."

Moreover, when increased by 10%, as prescribed by the Order, the rates in Official territory will still be the lowest class rates in the United States. The weight to be given to this evidence was for the Commission to determine.

In *City of Harrisonburg v. Chesapeake & O. Ry. Co.*, 34 Fed. Supp. 640, the court said at page 645:

> "In determining the reasonableness of a questioned rate, comparison with other rates in the same territory is not a conclusive test of the reasonableness or unreasonableness of the questioned rate, but such comparisons are proper evidence and have probative value: United States v. Northern Pacific R. Co., 288 U. S. 490, at page 500, 53 S. Ct. 406, 77 L. Ed. 914; Youngstown Sheet & Tube Co. v. United States, 295 U. S. 476, at page 480, 55 S. Ct. 822, 79 L. Ed. 1553. The extent of this probative value, *i. e.*, the weight given this evidence by the Commission, or which it should give it, it is not within the power of this court to determine. * * * It cannot be said, therefore, that the Commission acted without evidence or gave undue or improper weight to the evidence before it."

As we have already shown, the relatively lower class rates in Official territory are not justified by the differences in cost and other transportation conditions. Nearly all of the costs computations show that the

cost in the South are below the costs in Official territory. Western territory costs exceed the Official territory to some extent. The fact that the cost of providing railroad service in the South is as low, or lower than in Official territory, is evidence that the very much lower class rates in Official territory are relatively unreasonable.

Under Section 15(a) of the Act, the Commission is to consider the revenue needs of the carriers in the exercise of its power to prescribe just and reasonable rates. The evidence shows that the rate of return from freight traffic, based on the net railway operating income and the book investment, in the Eastern district has been less than in the Southern region in six years out of the eight-year period, 1936-43, and less than in the Western district in the years 1942-43 (644; R. 259).

The volume of class rate traffic moving in Official territory is much greater than in any other territory. The study of the movement of carload traffic transported on September 23, 1942, and the revenue therefrom, hereinbefore mentioned, shows that the volume of traffic transported on class rates in the South is only 1.8%, in the Southwest territory 2.4% and in Western Trunk Line .6% of the total intraterritorial traffic. In Official territory it is 5.8% (640; R. 255). The preponderance of less-carload traffic moves on class rates in Official territory.

The foregoing facts of record show that the evidence was sufficient to support the finding of the Commission that the Official territory carriers are dependent to a very large extent upon the revenue they re-

ceive from the class rates in issue and that the relatively low class rates in the Official territory adversely affect the revenue of the carriers in that territory, and that the class rates in Official territory should be increased pending an adjustment of the entire class rate structure east of the Rocky Mountains. In view of the revenue needs of the carriers in Official territory the Commission correctly concluded from the stipulated current operating returns of various carriers and other evidence of record that there should be an interim increase of 10% in the class rates in Official territory and it so ordered (705; R. 320).

THE COMMISSION HAS PROPERLY INTERPRETED AND APPLIED THE 1940 AMENDMENT TO SECTION 3 OF THE ACT.

Perhaps the principal reliance of appellants here is on their contention that the Commission misinterpreted and applied the 1940 amendment to Section 3 of the Act. In support of this contention it is urged that the Commission construed the amendment to the Act as a mandate requiring it to bring about uniformity of rates. There is absolutely nothing in the report of the Commission that supports this position. The Commission begins its discussion of the recent amendment to the Act with the statement (688; R. 303):

> "While the rates in issue in this proceeding are to be tested by all pertinent provisions of the act, it is important to give particular attention to certain amendatory legislation which Congress has recently enacted."

After reviewing the history of the amendment the report concludes (pp. 691-692; R. 306-307):

> "Considering the breadth of the language used in the amendments here under consideration, the evils sought to be cured by this legislation, the history of the times when the law was amended, as well as the statements of the legislators as to the purposes of the amendments—all proper aids of statutory interpretation—it is clear that the main purpose which Congress had in mind was to bring about a greater degree of equalization, harmony and uniformity in the different regional or territorial rate structures of the country. The method employed to accomplish this purpose is equally plain. By the amendment to the substantive anti-discrimination provisions of section 3(1) all discriminations in the form of undue or unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, as between regions, districts, or territories, viewed as separate entities, where brought directly within the purview of the act along with all the other inhibitions previously included. We were then authorized and directed by the other provisions mentioned to remove any such discriminations found to exist in a proper proceeding. This means that such discriminations as those mentioned which result from differences in the methods of distributing the general rate burden in the several rate-making territories, or from any other cause, if not justified upon proper consideration of recognized elements of rate-making applied in the light of the amended law are unlawful and should be corrected."

Thus the Commission holds that the amendment makes unlawful discriminations as between territories "if not justified upon proper consideration of recognized elements of rate-making applied in the light of the amended law." The Commission goes no further than to hold that the amendment to the Act gave it the same authority to remove discriminations against a "region, district or territory" that it had previously had to remove discrimination against individuals and localities. True, the evidence as to injury against a region, district or territory may differ in character from that with reference to injury to an individual shipper. For example, a territory is injured by a rate adjustment which prevents or discourages the establishment of new manufacturing plants within its boundaries but evidence of this result would not serve to establish injury to an individual shipper. On the other hand, evidence as to injury to an individual shipper, which prevents him from expanding his business, is also evidence of injury to the territory.

The evidence shows that the class rate structure has retarded the industrial development of the South and West and that the shippers in these territories are at a competitive disadvantage. It is difficult to measure the effect of the adjustment and that is the prerogative of an expert body, such as the Commission, created by Congress. The Commission analyzes the evidence relative to the effect of the rates on the industrial development of the South and concludes that there is need for an adjustment of the interterritorial class rates. Specific instances of territorial injury are cited by the

Commission in its report on pages 614-619 (R. 230-236).

The District Court disposed of the contention that the Commission had misconstrued and applied the 1940 amendment to Section 3 of the Act, at page 871 (R. 1431), as follows:

> "It does not appear that the Commission has herein acted upon any assumption that the 1940 changes altered the basic principles governing its action. On the contrary, it appears that in determining the existence of discriminatory rates it has construed the changes in the statute to mean that where it is found that class rates are different in the different territories, and interterritorially, and those differences cannot be justified under recognized principles of rate making by proof of sufficient differences in costs of transportation, composition and amount of traffic, competition by common carriers other than railroads, and the like, those rates may be found unjustly preferential or prejudicial because unduly discriminatory and consequently unlawful as between regions, districts and territories."

We, therefore, submit that the Commission has simply found the existing rates to be unduly discriminatory against certain territories and unduly preferential of Official territory by applying the established and recognized tests which it has heretofore applied in the case of individuals and localities and the District Court correctly so held.

THE COMMISSION DID NOT MISINTERPRET AND MISCONSTRUE SECTION 5(b) OF THE TRANSPORTATION ACT OF 1940, COMMONLY KNOWN AS THE "RAMSPECK RESOLUTION."

It is urged that the Commission construed the Ramspeck Resolution as constituting an amendment to the Interstate Commerce Act and as setting up new standards of rate-making. We find nothing in the reports of the Commission which supports this contention.

We have been able to find only four references in the reports of the Commission to the Ramspeck Resolution. The first reference is in the original report, where the Commission recites the history of the proceedings and states (pp. 512-513; R. 127-128):

> "Section 5(b) of the Transportation Act of 1940 authorized and directed us to institute an investigation into the rates on manufactured products, agricultural commodities and raw materials, between points in one classification territory and points in another such territory, and into like rates within any of such territories, maintained by common carriers by rail or water subject to part I of the Interstate Commerce Act, as amended, for the purpose of determining whether such rates are unjust and unreasonable or unlawful in any other respect. In our annual report, 1940, we said at page 30:
>
> "'The extensive class-rate and classification investigations above discussed may, we think, very properly be regarded as a highly important first step in this general investigation which Congress has directed us to institute'."

The second reference to the Ramspeck Resolution is found at pages 688-689 of the Original Report (R. 303, 304), where the Commission states:

> "By the Transportation Act of 1940, Section 3(1) of the act was amended by the addition of the words 'region, district, territory.' Coupled with that amendment was a provision designated as section 5(b) of the amendatory act of 1940. It authorized and directed us to investigate the rates on manufactured products, agricultural commodities, and raw materials between and within classification territories for the purpose of determining whether such rates are unjust and unreasonable or unlawful in any other respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness found to exist. As previously explained herein, we have advised Congress that it might consider the instant proceeding as an investigation under this special legislation."

It will be noted that the Commission simply points out that the resolution authorized and directed the investigation for the purpose of determining whether rates are lawful and the entry of such orders as may be appropriate for the removal of any unlawfulness found to exist. The Commission did not claim that the resolution added anything to its rate-making powers. The third reference to the resolution is found in supplemental report of October 30, 1945, where the Commission is dealing not with the standards of rate-making, but with the power under Section 15(1) to

order removal of any unlawfulness in the rates found to exist. The report states (p. 61; R. 464):

> "Having made the findings of unlawfulness, we have authority under section 15(1) of the Act and under section 5(b) of the Transportation Act of 1940, to prescribe the method for removing such unlawfulness, and to prescribe the rate levels or the rates which we find to be necessary to remove it. We may, by order, prescribe maximum or minimum or maximum and minimum rates to remove any unlawfulness, and such order need not provide for an alternative method."

Again, referring to its power to prescribe rates for the future, the report states (p. 62; R. 466):

> "Our general power under section 15(1) of the act to order the removal of any unlawfulness in rates found to exist after full hearing has been supplemented and reinforced, in so far as this particular investigation is concerned, by section 5(b) of the Transportation Act of 1940. After authorizing and directing us to institute an investigation of rates between points in one classification territory and points in another such territory or within a territory, we are specifically empowered by that provision 'to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist'."

Certainly it cannot be said that the Commission, by the foregoing references to the Ramspeck Resolution, construed same as setting up any standards of rate-making.

Appellants proceed to argue that the Commission construed the Ramspeck Resolution in the same manner that it had originally interpreted the Hoch-Smith Resolution in *California Growers' & Shippers' Protective League* v. *S. P. Co.*, 129 I. C. C. 25, 132 I. C. C. 582, and point out that the order of the Commission in that case was set aside by this Court on the ground that in making it the Commission had misinterpreted the Hoch-Smith Resolution. *Ann Arbor R. Co.* v. *U. S.*, 281 U. S. 658. There is no similarity whatsoever between the construction placed upon the Hoch-Smith Resolution by the Commission and that placed by it upon the Ramspeck Resolution, nor is there any similar provisions in the Ramspeck Resolution to the provisions in the Hoch-Smith Resolution which it was held the Commission misconstrued. That provision reads as follows:

> "In view of the existing depression in agriculture, the Commission is directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service * * *." (43 Stat., at L. 801, U. S. C., Title 49, Sec. 55.)

In the Ann Arbor case, *supra*, the court held that the Commission construed the above-quoted provision of the Hoch-Smith Resolution as making a change in the basic law. The court said at page 667:

"The third paragraph was construed by the Commission as making a change 'in the basic law,' as placing agricultural products in a 'most favored' class, and as justifying a reduction in the rates on deciduous fruits moving from California to eastern points, notwithstanding most of the carriers 'have not as yet made the fair return' for which section 15(a) of the Interstate Commerce Act makes provision as a means of securing the maintenance of an adequate transportation system. Indeed, it is apparent from the Commission's opinions that it regarded this paragraph as requiring it to condemn the existing rates as unreasonable and unlawful, although, had they been considered independently of the paragraph, they must have been upheld as reasonable and lawful under the applicable sections, 1(5) and 3(1), of the existing law."

The court proceeded to hold that the paragraph in question did not purport to make any change in the existing law and that the Commission erred in holding that it did change the law and in basing its order on such construction.

The only similarity which we can see between the Hoch-Smith Resolution and the Commission's construction thereof and the Ramspeck Resolution and the Commission's construction thereof is that both resolutions were adopted by Congress. The Ramspeck Resolution simply authorizes and directs the Commission to make an investigation of the rate structures and to make, in accordance with law, such changes and adjustments as may be necessary to correct any unlaw-

fulness. There is no reference whatsoever to the standards of rate-making and the Commission has not construed it as changing any of the standards of rate-making.

In the previous chapter we have pointed out that the District Court, after thoroughly considering the contention that the Commission acted upon an assumption that the 1940 changes altered the basic principles governing its actions, held that this contention was without merit. In so holding the court included the Ramspeck Resolution along with the amendment to Section 3(1) and also disposed of the contention that the Commission had made the same mistaken interpretation of the Ramspeck Resolution as had been made with reference to the so-called Hoch-Smith Resolution.

We respectfully submit that if the court is to consider the allegation that "the Commission applied not the standards of rate-making of the Interstate Commerce Act, but standards which the Commission erroneously believed to have been substituted by the Ramspeck Resolution" counsel should be required to point out just where, in the Commission's report, are found the statements on which this allegation is based.

THE FINDING THAT THE CLASS RATES WITHIN SOUTHERN, SOUTHWESTERN AND WESTERN TRUNK LINE TERRITORIES AND BETWEEN THOSE TERRITORIES AND OFFICIAL TERRITORY ARE UNJUST AND UNREASONABLE, IN VIOLATION OF SECTION 1, IS SUSTAINED BY THE EVIDENCE.

As we have already pointed out, no attack is made by any one on the finding as to the rates within Southern territory and we have already discussed the finding of unreasonableness of the rates within Official territory. There remains only the attack by the Western railroads on the finding as to the unreasonableness of rates within Southwestern and Western Trunk Line territories and between those territories and other territories. We leave in large part to others more directly interested to defend the order against attack by the Western carriers, but we desire to discuss briefly the evidence which supports the Commission's findings that the rates thus attacked are unjust and unreasonable, in violation of Section 1.

In the first place, the rates of the western carriers are shown to be the highest interstate class rates in the United States. They are also shown to be higher than the rates within other territories and higher than the intrastate rates maintained by the western carriers within their own territory.

In its supplemental report of October 30, 1945, the Commission found (p. 64; R. 469):

> "Intrastate class rates generally in most of the western States, and many of the interstate class

rates in western territory, are already lower than the interim basis prescribed in our prior report. That is clearly shown in the prior report and is substantiated by the petition filed by the western rail respondents, dealt with elsewhere in this report, for modification of our order respecting so-called subnormal class rates. Those respondents cannot consistently maintain these subnormal class rates and continue to maintain the relatively high basis of interstate class rates formerly prescribed by us as maximum in the western and southwestern class rate revisions. The comprehensive record made in this investigation is also convincing that the extent to which the level of those maximum class rates exceeds the levels of class rates in the South and East, particularly the latter, is excessive and is greater than is warranted by the differences in average costs and average freight rate levels."

Elsewhere we have discussed the question of probative value of a comparison of rates in determining the reasonableness of the rates in question and pointed out that it has been held that the weight to be given to such evidence is for the Commission. Certainly where, as here, a showing that the rates are higher than all other similar rates maintained in all other territories and maintained by the offending carriers in their own territory, constitutes substantial evidence to any reasonable mind that such rates are unreasonably high. When it is further shown, as here, that the difference in rates is not justified by the cost of the service the evidence is not only substantial, but, as we submit, conclusive. In numerous cases this Court has held

that evidence showing rates to be unreasonable in comparison with other rates constitutes sufficient evidence to uphold an order of the Commission condemning such rates as unreasonable and requiring them to be reduced. One of the leading cases on this subject is that of the *Virginian Ry.* v. *United States,* 272 U. S. 658. The court there said (665):

> "The Virginian contends that the evidence before the Commission does not support its finding that the rates on coal from the Virginian's mines via the Chesapeake & Ohio are unreasonable to the extent that they exceed the New River district rates maintained by the latter carrier from mines on its own and connecting lines having no other outlet to the western markets. The argument is that these rates cannot be considered standards of reasonableness because, as the Commission declared in the present controversy, they are 'the outcome of competitive strain and stress through long periods of development,' and, as it had stated in an earlier case, they have been made 'in practical, if not absolute disregard of distance, and all transportation conditions that ordinarily are taken into consideration in the making of rates,' and 'are below the level at which maximum reasonable rates might be maintained.' *Re* Bituminous Coal to C. F. A. Territory, 46 Inters. Com. Rep. 66, 122, 145. The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. ed. 1128, 1133, 27 Sup. Ct. Rep. 700."

The Commission found (Original Report, 696, R. 311):

> "Considerations of costs of service, consists of the traffic, distribution of the rate burden, and other factors usually given weight in determining lawful rates justify the conclusion that the class rates within southern, southwestern and western trunkline territories, and between those territories and official territory are unjust and unreasonable, and that the class rates to official territory from the other territories are unduly prejudicial to such other territories and unduly preferential of official territory."

Thus it appears that the Commission considered all relevant factors and applying the established standards of rate making found that the class rates here under discussion were unjust and unreasonable and ordered them reduced by 10%. As held by the court below, these findings were based upon ample evidence as to all of the factors considered. It is also to be remembered that after the 10% reduction ordered by the Commission is made effective the class rates in Southwestern and Western Trunk Line territory and between those territories and other territories will still be the highest class rates in the United States east of the Rocky Mountains.

THE ALLEGATION OF THE WESTERN RAILROADS THAT THE RATES PRESCRIBED BY THE ORDER ARE SHOWN TO BE CONFISCATORY BY THE COMMISSION'S COST STUDIES AND ON THE FACE OF THE REPORTS AND ORDERS.

The Southern States, on whose behalf this brief is filed, have no direct interest in this question but inasmuch as it is argued that the order here is indivisable, we feel that we cannot wholly ignore the charge although it will be fully discussed and met by counsel for the Government and for the Western States.

In the original petition of the western carriers (No. 345) it is alleged in paragraph XIX, page 17 (R. 846), that:

> "The cost studies offered in evidence by the Commission and upon which the Commission relied in ordering a reduction of plaintiffs' rates, show that the *ad interim* class rates prescribed by the Commission for Western Territory are so low that they will fail to compensate plaintiffs for transporting traffic moving on such class rates."

After reciting certain findings of the Commission with reference to less-than-carload traffic the paragraph proceeds to allege (p. 18; R. 847):

> "It is thus established on the face of the reports and orders that enforcement of the Commission's orders requiring reduction of the intra-territorial class rates in Western Trunk-Line Territory and Southwestern Territory and inter-territorial class rates between points within these

territories and between points in these territories and points in Official Territory and Southern Territory to the *ad interim* basis prescribed by the Commission would result in taking from your petitioners their property without just compensation and without due process of law in violation of the Fifth Amendment to the Constitution of the United States."

It will be seen that there is no direct allegation that the rates prescribed are in fact confiscatory but only that they are shown to be by "the cost studies offered in evidence by the Commission" and that confiscation is established "on the face of the reports and orders." Nor does the prayer of the petition ask the court to find that the rates prescribed are confiscatory. It thus appears that the sole reliance is upon the cost study introduced by the Commission's staff and the reports and orders of the Commission. This being true, there can be no ground upon which appellants can offer additional evidence, especially since they made no request to offer additional evidence before the Commission. In their petition for "reopening, reargument and reconsideration," filed with the Commission after the entry of the order here under attack, appellants not only did not request an opportunity to introduce evidence on the question of confiscation but, on the contrary, expressly stated, on page 114 of their petition (R. 12681):

"There is no necessity for a rehearing in this proceeding as long as the issues are restricted to the territory originally involved; this for the rea-

son that the record as made by respondent carriers in the Western District was as complete as it was possible to present."

This was said when the appellants had full knowledge and notice of the provisions of the order and the effect thereof. Inasmuch as the evidence upon which petitioners now rely was before the Commisison and considered by it, the rule of administrative finality applies.

It is not true that it appears from the cost studies offered in evidence by the Commission or from the Commission's reports that the class rates prescribed for Western territory and between that territory and other territories are confiscatory. The Commission found that:

> "* * * Such an analysis unmistakably reveals the fact that less-than-carload traffic generally in all the territories is not bearing its proper share of the costs of transportation—in fact, excluding wartime loading, it is not yielding, on the average, its out-of-pocket costs plus constant expenses solely related to this traffic, plus the cost of collection and delivery, in any territory except possibly in the southern where the margin of difference between revenues and these expenses is slight" (p. 697; R. 312).

The finding of the Commission, to which the petition refers, was with reference to *all* less-than-carload traffic and not with reference to such less-than-carload traffic as moves on class rates. Based on an analysis of less-than-carload traffic for the week of September

8-14, 1939, the ratio of less-than-carload traffic moving on commodity rates to total less-than-carload traffic in Western territory was 40% (Report 569; R. 184). It is well known that the commodity rates are lower than the class rates and, in fact, commodity rates are established for the purpose of taking the commodity out of the classification and establishing lower rates thereon. It is this 40% of the less than carload traffic that pulls the earnings down and inasmuch as the Commission was dealing with all less-than-carload traffic in the statement referred to, it cannot be said that the Commission found that the less than carload traffic moving on class rates failed to produce its full share of revenue for the carriers.

The Commission in its supplemental report of October 30, 1945 (p. 65; R. 471), pointed out that the cost data on less-than-carload traffic includes all of such traffic while much of it moves on rates that are lower than the prescribed class rates. The Commission said (R. 471):

> "The cost data on less-than-carload traffic relate to such traffic as a whole and not solely to that which moves on class rates. In appraising the figures it must be borne in mind that much of this traffic does not move on class rates, but on exception rates and commodity rates. Obviously, the class-rate traffic bears the highest rates. Consequently, even if under present conditions less-than-carload traffic, as a whole, in the West and South is not paying its proper share of the costs, it is possible that such result is due in a large measure to the maintenance of exception and com-

modity rates. In any event, data based only on averages for all this traffic do not necessarily demonstrate the impropriety of reductions in the highest level of rates. Even as to class rates on less-than-carload traffic, the record shows that in western trunk-line and southwestern territories many intrastate class rates and interstate class rates are maintained which are lower than the corresponding reduced interstate class rates required by our interim order."

While the broad allegation is made that the cost studies and the Commission's report show that the class rates are confiscatory, yet the only reference to the Commission's report is that part dealing with less-than-carload traffic. This less-than-carload traffic constitutes a very small part of the traffic of the western railroads. A table on page 611 of the report (R. 226) shows that in the western district all less-than-carload traffic constituted only 1.51% of the total traffic and 40% of this traffic moves on commodity rates that are not affected by the order of the Commission. The Commission made no finding that carload traffic moving on class rates fails to return full cost, including return on investment. It is shown that the contribution in excess of out-of-pocket costs of carload traffic designated as "manufacturers and miscellaneous" is 55.7% in the Western district, which is a much greater contribution than that made by any other group of commodities (Report 612; R. 227). When it is remembered that practically all traffic moving at class rates is in this group and that such traffic in the group as does

not move at class rates moves at rates lower than class rates, it necessarily follows that the carload traffic that does move at class rates is highly profitable.

We therefore submit that it is not true that it appears on the face of the cost studies and from the Commission's reports that the traffic moving on class rates in Western territory fails to yield full cost or is confiscatory. On the contrary, it appears that the class traffic is the most profitable traffic handled by the western railroads.

The allegation here is in direct conflict with the allegation in paragraph XI, page 9 (R. 839), that "there was no evidence as to the cost of transporting carload class rate freight in any territory or between any territories."

COLLATERAL QUESTIONS RAISED BY APPELLANTS.

In the foregoing pages we have discussed what we consider the only questions which are presented for the court's determination. These questions are:

(a) Whether the findings of the Commission that existing rates are unlawful is supported by substantial evidence,

(b) whether having made such findings, the Commission was authorized to enter the order here under attack, and

(c) whether the Commission misinterpreted or misapplied the law.

There are, however, numerous collateral questions raised, which, in fact, constitute a major portion of the petitions. While we do not think that these matters could possibly control the court's decision herein, yet we deem it necessary to discuss them lest our failure to do so be construed as an admission that the charges made are either true or within the province of the court to consider.

IT IS NOT TRUE THAT RATES ON RAW MATERIALS ARE SHOWN TO BE LOWER IN THE SOUTH AND WEST THAN IN OFFICIAL TERRITORY.

The allegation in the petition in No. 343 that the rates on raw materials and low-grade freight are relatively lower in Southern territory than in Official territory and that if the orders of the Commission are not annulled the citizens and communities on whose behalf plaintiffs bring this action will be discriminated against and will suffer great and irreparable injury by being required to pay increased class rates for transportation of manufactured articles on a parity with the reduced class rates within the South and West, while at the same time they will be required to continue to pay substantially higher transportation charges for the transportation of their raw materials and other low-grade freight than the transportation charges paid by their southern competitors, is contrary to the evidence and the conclusions of the Commission based upon the evidence.

In the first place, as has already been pointed out, the increased class rates in Official territory will still

be substantially lower than the reduced class rates in the South and West and between the territories. In the second place, it has not been shown that rates on raw materials are generally lower in the South and West than in Official territory.

Raw materials and low-grade freight usually move on commodity rates that involve different characteristics from the class rates and are not in issue in this proceeding. As stated by the Commission, there was no comprehensive showing in this proceeding as to the general level of commodity or raw material rates in the South as compared with those in Official territory.

It is needless to say that the few commodity rates referred to in the report are not representative of the commodity rate levels generally and this was stated by the Commission at page 600 of the report (R. 215),

> "At the oral argument it was contended that the comparisons of commodity rates just made indicate that the general level of rates on industrial raw materials in the South is low in comparison with that on similar traffic in official territory, and that the disadvantage to the South resulting from higher rates on manufactured articles is thereby offset. However, the record does not reveal the relative average levels of the rates on raw materials generally in the two territories. It will be noted also that a number of the low commodity rates in the south apply on commodities that cannot be classed as industrial raw materials, such as brick, fertilizer, and sand and gravel."

The commodity rates being constructed on so many varying conditions and circumstances to meet special situations often for short hauls, it is difficult to determine the level. Also the commodity rates are so numerous and unrelated that it is practically impossible to make an adequate study of the levels.

Commodity rates are usually unrelated to class rates and same are characterized by extensive grouping of origins, or destinations, or both. Differential relationships and other competitive adjustments frequently characterize commodity rate structures. Such rates are usually localized and reflect local transportation and competitive conditions more than is practicable with class rates. In numerous cases the Commission has refused to prescribe a uniform basis of commodity rates because the movement is highly localized. In *Hay Rates Within Western District* (1933), 195 I. C. C. 461, the Commission refused to prescribe a uniform basis of rates on hay in Western District because the movement was localized and the rates had been adjusted to varying local conditions. It should be noted that many of the existing commodity rate structures prescribed by the Commission have been the result of comprehensive investigations involving such rates but only the rates on a given commodity and not general commodity rate levels. As elsewhere shown in this brief, the Commission has never in any of the numerous class rate investigations leading up to this proceeding, considered or dealt with commodity rates, or exceptions.

On the limited commodities referred to in the report the rates are generally the same or lower in the South than in Official territory. A study by the Board of Investigation and Research of seventeen similar commodities showed that the rates studied were higher in the South than in the North. The Board concluded, however, that the sample was too limited to reflect the levels (H. D. 303—78th Congress, 1st Session).

It is of significance, however, the rates on commodities based on exception and column rates are higher in the South than the eastern rate scales as stated by the Commission at page 696 (R. 311), viz.:

> "One of the principal contentions of southern and western respondents, and of certain industrial interests, is that * * * many of the exception and column rates in the South and West are higher than the eastern level of class rates."

That rates, other than class rates, are generally higher in the South than in the East would seem to be established by the fact that the general level of freight revenues are from 3 to 5 per cent higher in the South than in the East, a fact established by the testimony of Dr. Edwards (Ex. 196, pp. 13 and 14; R. 11367). This higher level of freight revenues cannot be accounted for entirely by the higher class rates since only 1.8 per cent of the total traffic within the South moves on such rates and it therefore follows that, instead of the commodity and exception rates in the South being on a lower level than in the East they are actually on a higher level.

THERE IS NO MERIT IN THE CONTENTION THAT THE ORDER IS INVALID BECAUSE BASED UPON A "STALE" RECORD.

The petitions allege that the order is invalid because based upon evidence which "related to transportation, industrial and commercial conditions in 1939, and during the early war years, and the findings, especially the important findings as to cost, revenues and traffic, purported to relate to the early war years, whereas, as the findings themselves indicate and as the court should judicially recognize, conditions after the war are likely to be greatly different, so that there is no evidence as to what conditions will be when the order, by its terms, is to take effect."

In the first place, it is to be noted that evidence in the case was taken in public hearings as late as April, 1943, and by stipulation the Commission had before it and considered the financial reports of the railroads up to the date of the decision (original report of Commission, page 705; R. 320). It would be impossible in a case of this magnitude to have a more current record than that on which the Commission based its decision. As to the plea that the order should be set aside because the court should judicially recognize that conditions after the war are likely to be greatly different and that there is no evidence as to what conditions will be when the order by its terms is to take effect, it may be said that if this plea be sustained, then the Interstate Commerce Act is suspended and the Interstate Commerce Commission must abdicate until such time as it can be determined what conditions

will obtain after the war. The Commission has found that there will be greater necessity for a parity of class rates during the reconversion period after the war than in normal times.

As to the interim order, which is the only matter before the Court, the Commission specifically stated, at page 703 (R. 318):

> "This finding is based upon the peculiar circumstances of the present time, largely the result of the war, and because time will be needed to effectuate a classification revision and application of a scale or scales of class rates as our findings in part I and part II hereof contemplate."

As set forth in the petitions the matter of further hearings was urged upon the Commission by numerous petitions after its decision and further hearings were denied. The matter of rehearings is one of discretion and the discretion to be invoked is that of the body making the order.

Only once in the history of administrative law has this Court reversed an order of the Commission denying a rehearing on the contention that the record was "stale" and that was in the case of *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248. That was an unusual situation because since the record had been closed there had been one of the greatest financial crashes in the history of the country and the revenues of the carriers had been greatly depleted and their credit impaired. However, in the case of *Interstate Commerce Com.* v. *Jersey City,* 322 U. S. 503, this

Court, in an exhaustive opinion, discussed very fully the question of granting rehearings because of a stale record and distinguished the *Atchison T. & S. F. R. Co. case.* As we think that opinion constitutes a complete answer to the plea here and we quote from it rather fully, as follows (pp. 514-515):

> "The Price Administrator's contention is that this record is 'stale' and that a fresh record is important. One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise it has been considered that the dis-

cretion to be invoked was that of the body making the order, and not that of a reviewing body.

"Only once in the history of administrative law has this court reversed a Commission for refusing to grant a rehearing on the contention that the record was 'stale.' In Atchison, T. & S. F. R. Co. v. United States, 284 U. S. 248, 76 L. ed. 273, 52 S. Ct. 146, this court held that because of changed conditions the Interstate Commerce Commission abused its discretion in denying a rehearing. The record in that case was closed in September 1928. In February 1931, the railroads petitioned for rehearing and 'pointed out the grave reductions, in traffic and earnings, from which they were suffering, that their net operating income for 1930 was over $100,000,000 less than their average annual net operating income for the five years preceding, and that their credit was seriously impaired. At the time of this petition, the order * * * had not yet become effective, but the Commission stood upon the record of 1928 and, without reopening the proceeding or taking further evidence, provided that its order should become effective on June 1, 1931.' This, it was held, 'was not within the permitted range of the Commission's discretion, but was a denial of right.' 284 U. S. 248, 261, 262, 76 L. Ed. 273, 281, 282, 52 S. Ct. 146.

"The Court, however, promptly restricted that decision to its special facts. United States v. Northern P. R. Co., 288 U. S. 490, 77 L. ed. 914, 53 S. Ct. 406, and it stands virtually alone. In Baltimore & O. R. Co. v. United States, 298 U. S. 349, 389, 80 L. ed. 1209, 1234, 56 S. Ct. 797, Mr. Justice Brandeis, concurring, said, 'The Atchison

T. & S. F. R. Co. case rests upon its exceptional facts. It is apparently the only instance in which this Court has interfered with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing.' "

The opinion proceeds to discuss many other cases in all of which the court denied the plea that the order should be set aside because the administrative tribunal declined to reopen the case for further hearing.

The District Court considered the contention here that the Commission erred in declining to reopen the proceedings to receive additional evidence and disposed of it in the following language (p. 875; R. 1438):

"The denial by the Commission of the application to reopen the proceedings and receive additional evidence especially as to conditions subsequent to 1939 was not an abuse of its discretion. It is inevitable in such matters that an order by the Commission cannot be based on strictly up-to-the-minute proof. There must be unusual circumstances, not here present, to justify the reversal of an order such as this on the ground that it was based on a stale record. Interstate Commerce Commission v. City of Jersey City, 322 U. S. 503, 64 S. Ct. 1129, 88 L. ed. 1420. But see, Atchison, T. & S. F. R. v. United States, 284 U. S. 248, 52 S. Ct. 146, 76 L. ed. 273 as limited by United States v. Northern Pacific R., 288 U. S. 490, 53 S. Ct. 406, 77 L. ed. 914."

THE COMMISSION DID NOT ACT ARBITRARILY IN EXCLUDING THE POCAHONTAS LINES IN ARRIVING AT AVERAGE COST OF TRANSPORTATION.

It is urged that the Commission acted arbitrarily in excluding the cost of the Pocahontas Lines in arriving at relative average cost as between Official and Southern territories and that had the cost of the Pocahontas Lines been included in arriving at the average cost in Official territory the average cost in that territory would have been less than in Southern territory. Apparently the statement is based on a cost comparison by the southern carriers applying the territorial consist of the traffic for the 10-year period, 1930-39. A restatement of the 1930-39 computation by Dr. Edwards to remove deficiencies shows that the costs for the South to be approximately 1 or 2 per cent below those for the East, excluding the Pocahontas territory. The costs for the South were 6 to 8 per cent higher than the costs for the East, including the Pocahontas region. The eastern carriers introduced the same type of comparisons based on the five years, 1937-41. The costs for the South were found to be approximately the same as those for the East, *including* the Pocahontas region (582; R. 197). It is needless to say that the period 1937-41 is more representative of future conditions than the period 1930-39 including the depression years and for this period the inclusion of the Pocahontas territory is immaterial as the cost in the South is as low or lower than in the East, including the Pocahontas territory.

However, there is sound reason for considering the Pocahontas region separately from the other regions and not including it for cost purposes in any of the territories. While the Pocahontas Lines are included in Official territory in so far as the level of class rates is concerned, yet they are geographically in Southern territory and for many years the statistics of those lines in the Commission's Statistical Bureau have been included in the Southern district. Dr. Edwards, who prepared and submitted the cost studies, made the following statement as to his reasons for treating the Pocahontas Lines as he did (Ex. 196, page 110; R. 11367):

> "The Pocahontas lines were separated because their costs and the consist of their traffic are very different from that for the remainder of the East, approximately 84% of their traffic consisting of coal as measured by their tons forwarded or by revenue net ton-miles. In doing this I was influenced by the Commission's decision in General Commodity Rate Increases, 1937 (*Ex Parte* No. 115) (223 I. C. C. 657), where it stated that the sole justification for increasing the bituminous coal rates for the Pocahontas Lines lies in the needs of the other railroads. If the cost study had not separated the Pocahontas lines from the remaining lines in the East the 'needs of the other railroads' could not be set forth separately for the Commission's consideration. The cost scales introduced in this record show the costs for the East both including and excluding the Pocahontas Territory in addition to a separate

showing of the Pocahontas costs. Thus all possible bases for comparison are of record."

In the Commission's report it sets forth the comparisons of costs under various combinations in some of which the Pocahontas Lines are included in Official territory and others in which they are excluded and in no place does the Commission hold how the Pocahontas Lines, due to their peculiar location and transportation characteristics, are to be treated, and as to whether they are to be included in the one territory or the other in arriving at average territorial cost, or should be excluded from both territories. Surely this court will not undertake to substitute its judgment for that of the Commission as to how the railroads should be grouped for the purpose of arriving at average relative costs. If determination of such questions as this by the Commission are subject to review by the courts and if the court may substitute its judgment or conclusions for that of the Commission then the court may try the case *de novo* and surely it will not be contended that the court has any such authority.

THERE IS NO REASON FOR THE COMMISSION TREATING COMMODITY AND RAW MATERIAL RATINGS AT THE SAME TIME THAT IT PRESCRIBES CLASS RATES.

The argument is here made that because the investigation of the Commission and the order resulting therefrom deals with class rates only the order should be set aside until such time as the Commission may deal with commodity and raw material rates. There is

no merit in this contention because the Commission has always dealt with class rates separately and there are sound reasons for so doing. In the first place, class rates are, and almost from the beginning of transportation by railroad have been, made on mileage scales whereas commodity rates are made to meet special circumstances and are seldom if ever on a mileage basis. In view of the manner in which commodity rates are made and the purpose which they serve it would be impossible to deal with the level of commodity rates on a territory-wide basis and the Commission has never in its history undertaken to so treat them.

Elsewhere we have discussed the previous Class Rate Cases in which the Commission prescribed uniform class rates for application throughout the several territories. In none of these cases did the Commission deal with commodity rates nor rates on raw materials and there is no more reason for them doing so in this case. So far as appears neither in those cases nor in the instant case did any one make any request that the Commission deal with commodity or raw material rates. Appellants here urged that the class rates in the South should be on a higher level because of the unproven claim that raw material rates were lower in the South than in the North, but at no time did they request an investigation into such rates. If such an investigation is desired, appellants should make application, pursuant to Section 5(b) of the Transportation Act of 1940, to the Interstate Commerce Commission to institute same. No such application has been made either in the course of this proceeding or independently

and appellants should not now be heard to contend that the class rates here prescribed should await an investigation of the commodity rates or rates on raw materials.

THE FACT THAT THE COMMISSION HAD PREVIOUSLY PRESCRIBED CLASS RATES IN THE SEVERAL TERRITORIES HAS NO BEARING ON THE VALIDITY OF THE ORDERS HERE.

Counsel for appellants continuously harp upon the fact that in previous decisions the Commission had prescribed class rates in the several territories and they contend that the rates here prescribed, being different from those previously prescribed, cannot be sustained because there is no showing as to change in conditions.

It would seem unnecessary to discuss this subject inasmuch as this court has repeatedly held that whether or not a decision of the Commission, under attack, is consistent with its previous decisions is a matter beyond the province of the courts. *Virginian R. Co.* v. *United States,* 272 U. S. 658. However, since the decision here is clearly not in conflict with previous decisions, we think the Commission should be defended against this charge of inconsistency.

In each of the previous cases, the Commission had before it only the rates to a given territroy, while here it had under investigation not only the rates in all of the territories, but the rates between such territories. The Commission points out that the difference in level which resulted from its previous decisions created an incongruous situation and prevented the interterri-

torial rates from being properly harmonized with intraterritorial rate structures. Moreover, there had been many changes in transportation conditions, in the movement of traffic, the revenues of the carriers and other proper considerations since the decisions in the Territorial Class Rate Cases. Most important of all, the Commission had before it the record which enabled it to judge results in the actual operation of the rates previously prescribed for intraterritorial application. The Commission sums up the situation in its original report (p 688) as follows (R 303):

> "The record also affords us an opportunity to analyze and appraise the functioning over a period of more than 12 years of different territorial class-rate structures. It enables us also to compare the results of such a test one with another, to check such results with the purposes intended to be accomplished when these rate structures were prescribed, and on the whole to translate into our conclusions all the lessons thus learned by experience."

THE RELIANCE OF APPELLANTS IN No. 343 ON THE DISSENTING OPINIONS IS NOT JUSTIFIED.

Counsel for appellants in No. 343 relies upon and quotes from the dissenting opinions at considerable length (pages 18-20 of appellant's brief in No. 343). In the first place, it should be pointed out that all the Commissioners, save one, found that the existing rates were unlawful and agreed substantially to the interim order here involved. The only Commissioner who

failed to agree that existing rates were unlawful was a new appointee to the Commission who had not participated in any of the hearings or heard the oral argument.

This court has held that "The legal effect of a challenged report and order is the same as if supported by all members of the Commission." *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 362. In so far as the dissenting opinions reach different conclusions on the facts of record than those reached by the majority they are not open to be considered by the court. This was expressly held in the case of *Interstate Commerce Com. v. Delaware and L. W. R. Co.*, 220 U. S. 235, where the court said (p. 251):

> "As shown by the opinion of the Commission and that of the two members who dissented, there were many and wide differences in the views expressed. On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition; that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry; or, what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. We say the contentions all reduce themselves to be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to

which the judgment of the Commission is not susceptible of review by the courts. Baltimore & O. R. Co. v. United States, *ex rel Pitcairn*, 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. Rep. 164. This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so considered by the court, because they were foreclosed by the opinion of the Commission."

Here much reliance is had upon the dissenting opinion of Commissioner Porter; but we wish to point out that notwithstanding the criticism by Commissioner Porter of the findings by the majority, yet his conclusion was that existing rates were unlawful and that the record justified action that would increase the rates in Official territory and go much further towards bringing about a parity of rates as between the South and Official territory than does the interim order of the majority, which is here under attack. We call attention to the following statement by Commissioner Porter as to the adjustment which he considers justified by the record (p. 723):

"I would find that the present class rates in official territory, other than in New England and

in Michigan Zone C, are below a maximum reasonable level by about 6 per cent, and that the existing class rates in the South and the West here in issue are unreasonable, (a) intraterritorially, to the extent that they exceed or may exceed the official territory rates as so increased by more than 10 percent in the southern region, except the Florida peninsula, and in western trunk-line Zone 1, and by more than 21 percent in western trunk-line zones II and III, in the Southwest, and in the Florida peninsula; and (b) interterritorially, between all territories, to the extent that they exceed or may exceed the resulting destination territory basis in each instance."

Thus Commissioner Porter would reduce the rates within the South by a much greater percentage than the 10% directed in the Commission's order and would raise the rates in Official territory, although not by as great a percentage as that contained in the order. He would also reduce the interterritorial rates between Official territory and the South by a greater percentage than prescribed in the order. He would make the rates from the South to the North on the basis of the Official territory rates, increased by 6%, and this would, of course, result in a much greater reduction than by reducing the present rates from the South to the North by 10%. Likewise he would reduce the rates from the North to the South by a percentage much greater than 10% because he would make such rates on the same basis as his proposed rates within the South, which, as we have seen, would be much lower than the present rates from the North to the South reduced by 10%.

It therefore follows that the criticisms in the dissenting opinion of Commissioner Porter are not directed at the interim adjustment prescribed by the Commission in so far as it prescribes rates within the South and Official territory and between those territories because, as matter of fact, Commissioner Porter finds that on the record the South is entitled to a very much better adjustment than that so prescribed. True, he would increase the rates in the North 6% instead of 10%, but he would find present rates in the North below a maximum reasonable level.

What has been said as to the South is likewise true as to the West, because the rates in the West and between the West and other territories will be higher under the interim adjustment than they would be under Commissioner Porter's suggested finding. Thus if the record supports his various conclusions, it must support the conclusions of the majority in principle if not in exact rates prescribed.

THE CHARGE THAT THE COMMISSION WAS INFLUENCED BY THE PENDENCY OF VARIOUS BILLS IN CONGRESS AND BY POLITICAL AND OTHER FACTORS CONSTITUTES A WHOLLY UNWARRANTED ATTACK UPON THE INTEGRITY OF THE COMMISSION.

Counsel for the States of New York, Delaware, *et al.*, appellants in No. 343, has seen fit to reiterate in his brief before this court the charge made in his original petition and urged upon the court below that the orders here are invalid because "they reflect the influence of various bills which had been introduced in

Congress and of political and other factors which the Commission could not properly consider, and their enforcement would therefore be a denial of the fair hearing required by the Interstate Commerce Act (R. 50).

No other counsel has joined in this charge and the counsel making it states, on page 28 of his brief, that appellants "* * * hope that the sectional aspects of this litigation may be ignored lest they tend to obscure the more fundamental and far-reaching features of the proceeding. * * *"

The query naturally arises as to why counsel has seen fit to drag these charges before the court if he hopes that they may be ignored. There is no justification on the record for this attack upon the Commission and the only justification offered is a recital of matters extraneous to the record. It is stated that several bills had been introduced in Congress by representatives of the Southern States, which bills, if enacted, would deprive the Commission of jurisdiction to prescribe class rates on the basis of evidence and would require that class rates be established on uniform level regardless of the facts of the transportation involved. Counsel does not state the fact, which was well known to him, that the Southern Governors Conference consistently opposed the passage of any such bills and insisted throughout that it was the duty of the Interstate Commerce Commission to remove the discrimination in class rates shown to exist and that the exiting Act of Congress gave it ample authority so to do. Counsel states that the atmosphere created by the pendency of these bills "was described by the

late Commissioner Eastman in his dissenting opinion in a companion proceeding brought by the Governors of the Southern States, *States of Alabama* v. *New York Central R. Co.*, 235 I. C. C. 255," and quotes from that dissenting opinion. He fails to state that the dissenting opinion was rendered on November 22, 1939, nearly six years prior to the decision of the Commission in the case at bar and that the atmosphere there described had in the meantime resulted in the enactment of the Transportation Act of 1940.

It is true that shippers and receivers of freight and the public generally in the South and west have long felt that the class rate adjustment subjected them and their sections to undue and unjust discrimination and that this widespread feeling had resulted, as such feeling alwyas does, in the introduction of numerous bills in Congress by the representatives of those sections of the country. The Southern States and the Southern Governors Conference have never supported any of such bills except the amendments to Section 3 of the Interstate Commerce Act, adopted in 1940, which made it clear that the Commission was empowered to remove discrimination not only against individuals and communities, but also against "region, district, territory." When the Commission undertakes to give effect to this Act of Congress it is charged with being influenced by political factors and thereby denying the fair hearing required by the Interstate Commerce Act.

The truth is that appellants, whose counsel makes this charge, have for many years enjoyed special privileges and been the beneficiary of discriminatory freight

rates and those who have been injured by this situation have been desperately trying to have it corrected. Now that appellants see these privileges and preferences beginning to be taken away from them by the agency authorized by Congress so to do, they cry "politics," and as a last desperate measure rush to the courts in the hope that they may delay, if they cannot stop, the onward sweep of justice. Throughout our history this has always been the course of entrenched privilege. One has only to read the decisions of this court to find that this last desparate recourse has seldom, if ever, succeeded.

In *American Trucking Assn.* v. *U. S.*, 56 Fed. Supp. 394, counsel in their brief, though not in the pleadings, used such phrases as "truly the Commission's generosity to the railroads knows no bounds" and "the hearings which the Commission now holds on any railroad application for motor carrier rights are a farce."

In commenting on these statements the court said, at page 400:

> "We find nothing in this record (or, for that matter, in the history of the Commission) that would justify such unrestrained language about an administrative body of rather unusual age and somewhat exceptional distinction. The language, we think, adds nothing to either the strength of the case of the plaintiffs or to the credit of their counsel."

We think it can be here said with equal truth that this allegation "adds nothing to either the strength of the case of the plaintiffs or to the credit of their counsel."

THE ORDER HERE UNDER REVIEW HAS NOT BEEN "VITIATED" OR "RENDERED OBSOLETE" BY THE ACTION OF THE COMMISSION IN EX PARTE 162.

Counsel for appellants in Nos. 343 and 344 now argue that the interim order of the Commission has been "vitiated" or "rendered obsolete" by the action of the Commission in a proceeding known as *Ex Parte* 162, wherein the Commission authorized, but did not prescribe, certain general increases in rates. This point is not made by counsel for the western railroads, appellants in No. 345, probably because such counsel knows that in the proceeding referred to counsel for all of the railroads in the United States, including the western railroads, urged upon the Commission that the granting of increases there requested would not in any way affect the order of the Commission involved in these proceedings.

In its original report in Ex Parte 162, dated June 20, 1946, the Commission dealt with the effect upon the order here in question of the granting of the proposed increases, as follows (sheet 12):

> "*Class Rates.* In initial publication all existing class rates would be increased 25 per cent. Thereafter, the existing relations of lower classes to first class would be restored by tariff amendment. The proposal contemplates that the present class rates, if subsequently revised as required by orders now outstanding but that are not presently effective, would be increased by 25% of the amounts prescribed in such orders instead of that percentage upon the class rates now applicable.

"Specifically, the petitioning class I railroads do not propose to change in this proceeding the relation between the class rates within and between the several territories prescribed by us in Class Rate Investigation, 1939, 262 I. C. C. 447, 264 I. C. C. 41. By proceedings brought under the Urgent Deficiencies Act, 1913, in the United States District Court for the Northern District of New York, nine States in official territory brought suit to annul our order in that proceeding, and to stay all attempts by us to enforce it. In this they were joined by railroads in western territory as interveners. A temporary restraining order was granted and was in effect at the time of the hearing in this proceeding. While the hearing was in progress before us, the District Court announced its decision, which sustained our order in the *Class Rate Investigation, 1939*, and adopted our findings of fact in the reports cited as its own. The decree was not entered in the District Court until May 27, 1946, and when entered continued the stay of our order for sixty days, conditioned upon an appeal being taken within that period to the Supreme Court of the United States, and if the case was so appealed, until determination thereof by the Supreme Court. From this provision of the decree of dismissal of the suit, the United States, the Commission, and other interveners perfected an appeal directly to the Supreme Court of the United States, and moved unsuccessfully—for a dissolution of the stay ordered by the District Court.

"In this situation, only partially developed at the time of the hearing in this proceeding, the petitioners herein suggest that the 25 percent increase sought should be applied to the class rates

in effect at the time our order is entered based upon the hearing, conditioned that if and when the order in the class rate proceeding becomes effective, the same percentage increase shall apply to the class rates prescribed in that case."

It will thus be seen that the proposal was to make the increases requested based on existing rates, but that if the order here in question was sustained and became effective that the changes in the then existing rates required by the order would be made and the increases, which might be authorized, would be appleid to the rates resulting from making the order effective. It is said, however, that the rates to which the increases applied are no longer in existence. This, however, is not true because the rates which the Commission had before it in the proceeding here involved are still published rates to which the authorized increases have been applied by master tariffs, which provide that the existing rates are increased by the percentage authorized. It would be a perfectly simple matter for the railroads to change the rates that were in effect when the findings in *Ex Parte* 162 were made so as to give effect to the order here and then add the increases authorized by the findings in *Ex Parte* 162.

Not only did the Commission set forth the situation, as above quoted, but in its ultimate findings on sheet 48, finding 13, it provided:

"13. Appropriate orders for relief under sections 4(1), 6, 217, 306, and 405 of the act will be entered; except as specified in the following sentence of this finding our outstanding orders will

be modified accordingly, and these proceedings are both continued on our docket. As the effectiveness of our orders in *Class Rate Investigation, 1939,* Docket No. 28300, is now stayed and enjoined, we do not hereby in any manner suspend or supersede, or modify or affect the findings and order entered in that proceeding."

Again, in its final report in *Ex Parte* 162, of December 5, 1946, the Commission was careful to provide, sheet 65, finding 20:

"20. Appropriate orders for relief under sections 4(1), 6, 217, 306, and 405 of the Interstate Commerce Act will be entered; except as specified in the following sentence of this finding our outstanding orders will be modified accordingly. As the effectiveness of our order in *Class Rate Investigation, 1939,* docket 28300, is now stayed and enjoined, we do not hereby in any manner suspend or supersede, or modify or affect the findings and order entered in that proceeding."

The two preceding statements are a part of the finding and order set forth in Appendices B and C to the brief in No. 343, but they are not referred to in the body of either brief in which this point is raised.

Throughout the proceeding in *Ex Parte* 162 the Commission made it clear that the rates resulting from its interim order in this proceeding would, when they become effective, be the base on which would be established the increases authorized in *Ex Parte* 162.

As has already been stated, it would be a perfectly simple matter for the Commission to make its order,

here involved, effective and apply to the rates resulting therefrom the increases which it authorized in *Ex Parte* 162. If this be not true, however, then why should counsel for appellants be concerned? If it be true, as they now claim, that it would be impossible to make the order here under review effective, then they have nothing to fear from it. However, knowing well that the order can and will be made effective they urge, not that the case is moot, but that the order, which they say is unenforceable, be set aside.

One of the arguments made is that the uniform scale set up by the Commission for ultimate application to the uniform classification, when same is adopted, would be outmoded because it would be lower than the rates resulting from the increases authorized. It is sufficient to again point out that the Commission made no order as to the ultimate adjustment and that matter is still within the control of the Commission and is not here under review.

It is also contended "that inasmuch as the ordered reduction in southern and western class rates was premised exclusively on a finding that those rates exceeded maximum reasonable class rates by 10%, it now being apparent from the Commission's subsequent action that those rates are in fact materially less than maximum reasonable class rates, the ordered reduction cannot stand and as the order is integral, the order as an entirety cannot stand." This argument overlooks the fact that the Commission, by its order here in question, found the class rates in the South and West to be unreasonably high and ordered them reduced and

in *Ex Parte* 162 it simply authorized certain increases in the rates so reduced in order to take care of certain increased operating expenses, principally wages and rates of pay which were nationwide, and required an increase in all rates to produce the necessary revenue.

Ex Parte 162 was what is known as a "general revenue case," in which the Commission authorized certain increases to produce increased revenues on a nationwide scale, which were required to meet increased expenses. This is an entirely different character of proceeding from that which resulted in the order now under review since the latter proceeding was one to eliminate discriminations and unfairness in the rate adjustment. The distinction between the two characters of proceedings has been recognized by this court. In *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. at page 584, the court, speaking through Chief Justice Stone, said:

> "The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to the level so as to eliminate discriminations and unfairness from its details."

This statement by the Chief Justice was quoted with approval in the opinion of the Court in *Interstate Commerce Commisison* v. *Jersey City*, 322 U. S., at page 517.

Here, in granting the nationwide increases the Commission took as the base the class rates which would result from the becoming effective of the order here involved. By reason of the interlocutory injunction restraining the order, which was designed to eliminate discrimination and unfairness, it was necessary to permit the authorization as to the general revenue level to become effective prior to the order removing discriminations and unfairness, but that no way affects the validity of the later order. In granting the nationwide increases the Commission took as the base class rates which would result from the becoming effective of the order here involved. Clearly the authorization made in *Ex Parte* 162 by the Commission would have been different had it been the purpose either of the Commission or of the railroads to add those increases without giving effect to the order here in question.

Counsel for appellants point out that if the order here is permitted to become effective and the increases authorized in *Ex Parte* 162 added to the rates thus arrived at, the resulting rates in Official territory will be 37½% over the rates in effect when the order was made in 1945, while the rates within the South and West will be increased only 8%. This is true, but it will leave the class rates in Official territory lower than the class rates in the other territories. For example, the first class rate in the South at the time of the order here was 137% of the first-class rate in Official territory, and assuming that the Official territory first-class rate was $1.00, the resulting rate would be $1.37½, whereas the southern rate of $1.37 will become $1.48.

Of course, the rates in the West will be even a greater amount in excess of the rates in Official territory and the result will be that the Official territory class rates *will continue to be the lowest class rates east of the Rocky Mountains.*

In view of the care which the Commission has taken to preserve the integrity of the orders, here in question, the claim that the Commission has permitted the orders to become obsolete is clearly without foundation, but, in any event, if the orders are valid, it should be left to the Commission to put them into effect.

THE ORDER IS DIVISIBLE.

We have shown that no one is here attacking that part of the order which requires a reduction of 10% in the rates within the South. We think that we have also demonstrated that the portion of the order which requires a reduction of 10% in the rates from the South to Official territory and an increase of 10% within Official territory is amply supported by the record and the law. Assuming these propositions to be established, can it be said that this court should enjoin and set aside the order as to them simply because the court might find that that portion of the order requiring a reduction in class rates in the West is invalid. While we insist that the portion of the order reducing class rates in the West is valid and have endeavored to so demonstrate, yet we contend that in order to sustain the validity of the order as it applies to the South and Official territory, it is not necessary to sustain the validity

of the order as it applies to rates in the West. It would be a miscarriage of justice to deprive the South of the benefit of its long and arduous effort for a more favorable class rate adjustment simply because in the same proceeding a change ordered in class rates in the West is found to be unlawful. Should this court find the reduction ordered in class rates in the West cannot be sustained, it should set aside only so much of the order as requires such reduction, leaving the remainder of the order in full force and effect.

That the District Court considered the order divisible is shown by the fact that its order dismissing the petition of the western railroads was made "without prejudice to another suit to restrain the enforcement of said ad interim rates if they are found, after fair test, to be confiscatory." No such reservation was made as to the other petitions and it therefore follows that the court considered that the order could be set aside as to rates prescribed for the western lines while the remainder of the order continued in effect.

CONCLUSION.

For the reasons set forth herein, the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX.

Section 1 of the Interstate Commerce Act (Feb. 4, 1887, 24 Stat. 379, 49 U. S. C. Sec. 1, as amended) contains the following paragraphs:

> (4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.
>
> (5) (a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3(1) of the Interstate Commerce Act, as amended, particularly by the Act of September 18, 1940, 54 Stat. 902, provides as follows:

> (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or ad-

vantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 15 of the Interstate Commerce Act contains the following paragraphs:

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair,

and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 15a of the Interstate Commerce Act, added February 28, 1920, 41 Stat. 488, as amended June 16, 1933, 48 Stat. 220, and September 18, 1940, 54 Stat. 912, provides as follows:

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Section 5(b) of the Transportation Act of 1940, known as the Ramspeck Resolution, 54 Stat. 902, 49 U. S. C., note preceding Sec. 3, provides as follows:

(b) The Interstate Commerce Commission is authorized and directed to institute an investigation into the rates on manufactured products, agricultural commodities, and raw materials, between points in one classification territory and points in another such territory, and into like rates within any of such terri-

tories, maintained by common carriers by rail or water subject to part I of the Interstate Commerce Act, as amended [this chapter], for the purpose of determining whether said rates are unjust and unreasonable *or unlawful in any other* respect in and of themselves or in their relation to each other, and to enter such orders as may be appropriate for the removal of any unlawfulness which may be found to exist: Provided, That the Commission in its discretion may confine its investigation to such manufactured products, agricultural commodities, and raw materials, and the rates thereon as shippers thereof may specifically request be included in such investigation."

The National Transportation Policy as declared in the Transportation Act of 1940, 54 Stat. 899, 49 U.S.C., note preceding Sec. 1, provides as follows:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Certificate of Service.

I hereby certify that I have served the foregoing brief upon the following counsel of record by causing a copy thereof to be mailed, postage prepaid, to each of said counsel:

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